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Supreme Court, U.S.
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In The

Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does California's mediation confidentiality law, Cal. Evid. Code §§ 1119, 1123, abort the due process rights of an involuntary participant by allowing for an unwarned irrevocable taking of the participant's causes of action when the participant involuntarily signs the mediation settlement agreement?

PARTIES TO THE PROCEEDINGS

The Petitioner is Bill Chan, an individual. The Respondents are Kathleen M. Lund and Craig T. Lund, individually and as co-trustees of the Lund Family Trust, Norma Tree Service, and Norma Gonzales.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bill Chan is an individual, making this petition on behalf of no corporate entity.

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The California Supreme Court denied, without opinion, the Petition for Review on January 12, 2011, as case number S187992. This denial appears in the Appendix (App.) to this petition. App. at 43.

The Sixth Appellate District Court of Appeal denied Petitioner's appeal on September 29, 2010, as case number H034196. App. at 1-36.

The Sixth Appellate District Court of Appeal denied rehearing and modified its opinion on October 28, 2010. App. at 37-38. The Sixth Appellate District Court of Appeal's opinion is also published as *Chan v. Lund*, 188 Cal. App. 4th 1159 (Cal. Ct. App. 2010).

JURISDICTION

The California Supreme Court issued its final judgment on January 12, 2011. App. at 43. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AT ISSUE AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 1119 of the California Evidence Code provides:

> Except as otherwise provided in this chapter:
>
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a

mediation consultation shall remain confidential.

Section 1123 of the California Evidence Code provides:

> A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:
>
> (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
>
> (b) The agreement provides that it is enforceable or binding or words to that effect.
>
> (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.
>
> (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Section 664.6 of the California Code of Civil Procedure provides:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the

> court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

STATEMENT OF THE CASE

A. Procedural Background

On June 6, 2005, Chan contacted counsel for purposes of preventing continuing trespasses on his property. On October 5, 2006, Chan filed a complaint against the Lunds alleging damages of $78,000 for trespass and negligence to a row of fourteen Leyland cypress trees. He later amended his complaint to include Norma Tree Service, the contractor hired by the Lunds to cut and trim the row of trees. A trial court date was scheduled for August 4, 2008.

On October 30, 2007, November 27, 2007, March 19, 2008, and July 15, 2008, mediation was held between all parties. No agreement was reached. On Sunday, August 3, 2008, Chan's attorney threatened to abandon him at trial rescheduled from Monday August 4, 2008 to Tuesday, August 5, 2008, if Chan did not submit to a fifth mediation. On Monday, August 4, 2008, the same threat of abandonment was used to secure a signed settlement agreement, App. at 44-47, the enforcement of which has been questioned, and is here questioned, on due process grounds.

On September 22, 2008, Chan filed for a substitution of attorney, substituting Bruce Tichinin, Esq. in place of his former attorney.

On October 21, 2008, Chan, via his new counsel, moved to reset the case for trial alleging duress, undue influence, fraud, prohibited financial dealing with a client, undisclosed dual agency, and public interest.

The Lunds and Norma Tree Service made motions to enforce the settlement agreement set for November 13, 2008, and Chan filed his declaration in opposition.

On November 13, 2008, the Superior Court of the State of California, County of Santa Clara, granted the motion to enforce on the ground that there was no supporting evidence to corroborate Chan's testimony that his consent to the agreement was obtained by the extortion, fraud, and duress of his former attorney. App. at 39-42.

On November 25, 2008, Chan made the first of two applications for an *ex parte* motion asking the court to reconsider on its own motion the enforcement of the settlement agreement based upon new evidence. The matter was argued and submitted on December 2, 2008. A supplement to this *ex parte* motion was filed on December 11, 2008, regarding the constitutionality of California Evidence Code sections 1119 and 1123. The court denied the first *ex parte* motion on December 22, 2008.

On March 10, 2009, Chan filed his second *ex parte* application with an offer of proof and reference to the constitutional arguments on due process grounds made in the supplement of December 11, 2008. On

March 11, 2009, the Honorable Judge Cabrinha denied the motion and signed the order enforcing the settlement agreement of August 4, 2008. App. at 39-42.

Chan filed a notice of appeal on May 7, 2009, asserting that "Evidence Code provisions concerning the confidentiality of communications during mediation and precluding testimony by the mediator in subsequent proceedings are unconstitutional under the Due Process Clause of the United States and California Constitutions as applied in this instance, because such mediation confidentiality deprived him of the ability to present evidence (i.e., the mediator's testimony) to establish that Chan's consent to the settlement was coerced." Chan v. Lund, *supra*, 188 Cal. App. 4th at 1163. On September 21, 2010, the Court of Appeal held oral arguments. The Court of Appeal affirmed the Superior Court's decision. The Court of Appeal's opinion was filed on September 29, 2010. App. at 1-36.

Chan filed a petition for rehearing on October 14, 2010. The Court modified its opinion but denied rehearing on October 28, 2010. App. at 37-38.

On November 8, 2010, Chan filed a petition for review to the California Supreme Court. The Lunds filed an Answer. Chan filed a Reply on December 6, 2010. On January 12, 2011, the California Supreme Court denied the petition for review. App. at 43.

B. Factual Background

Petitioner Chan was an involuntary participant in, and involuntary signatory to the mediation settlement agreement, App. 44-47, enforced under California Code of Civil Procedure section 664.6. App. 39-42. California Evidence Code sections 1119 and 1123 (California mediation confidentiality law) prohibited Chan from presenting evidence of his involuntary participation and involuntary signature in his opposition to enforcement. This violated Chan's right to due process of law before the taking of his property interests in his causes of action. *See infra*, at 13-33.

On August 3, 2008, two days before trial, Chan met with his attorney to prepare for trial. At this meeting, Chan's attorney threatened abandonment if Chan did not submit to mediation the next day. Chan would later find only one case that his former attorney took to trial as far back as court records would permit to the mid 1980s. In that case, Chan's former attorney was selected by the bar association to defend an indigent person. He faced bar association discipline if he did not try the case. That indigent person was convicted, served his sentence, and later found exonerating evidence in his file as held by Chan's former attorney. As a result, the client sued for malpractice, but was barred by the statute of limitations. Frost v. Fox, 53 F.3d 338 (9th Cir. 1995) (unpublished decision), 1994 WL 412440 (N.D. Cal. 1994).

Chan arrived at the scheduled mediation conference on August 4, 2008. When the mediator, Mr. Kelly, asked him if he was there to attend mediation, Chan responded, "Not really. I am here to find out if my attorney is going to represent me tomorrow at trial." Pl.['s] Decl. in Opp'n to Mot. to Enforce, No. 106-CV-072392 at 5: ¶ 20 (Cal. Super. Ct. Nov. 13, 2008). Chan was then coerced and extorted by his attorney's continued threat of abandonment both to participate in the mediation and to sign the mediation settlement agreement. Chan immediately sought new counsel and filed a substitution of attorney on September 22, 2008.

In the first *ex parte* motion filed November 25, 2008, and its supplement filed December 11, 2008, Chan attempted to set a hearing date for reconsideration on the Court's own motion based on new evidence which consisted of a letter Chan received from his former attorney and a corroborating witness. The letter was dated August 7, 2008, three days after the mediation settlement was reached, and confirmed that because Chan had settled on August 4, 2008, he would receive a fee reduction of $10,000. Chan v. Lund, No. 106-CV-072392 (Cal. Super. Ct. Nov. 25, 2008). The corroborating witness for Chan was the mediator, Mr. Kelly, who was expected to corroborate that Chan's signature was obtained by the duress, undue influence, fraud and illegality of his former attorney. Chan's attorney, in the December 11, 2008, supplement, also argued that the exclusion of evidence under California Evidence Code sections 1119

and 1123 was a denial of Chan's due process rights in that it allowed the party seeking to enforce the agreement to present evidence of Chan's consent by submitting the agreement with his signature, while Chan could not present corroborating testimony that the consent reflected in the signature was not free and real, but procured by unlawful means. Chan v. Lund, No. 106-CV-072392 (Cal. Super. Ct. Dec. 11, 2008). Chan's attorney argued that Chan's causes of action were property interests protected by due process and that Chan had no meaningful opportunity to be heard before they were taken.

The Court of Appeal affirmed the Superior Court's decision by applying a *de novo* standard of review in deciding "whether, assuming that his attorney threatened to withdraw as his counsel and offered to discount his fee, Chan was entitled to rescind or avoid the Settlement Memorandum he admittedly signed and thereby prevent enforcement of the Settlement." Chan v. Lund, *supra*, 188 Cal. App. 4th at 1169. The court doubted the extortion and coercion, however. In support of its doubt, for example, the court referenced a letter of August 12, 2008, "from Chan's attorney to Norma Tree's attorney, indicating that Chan had only '"one reservation and qualification"'." *Id.* at 1172, n. 16. Regarding this example, the Court of Appeal apparently overlooked Chan's declaration in which he stated that "as of the date I received the letter, I had not reviewed these drafts, nor had I advised [my attorney] or anyone that they were acceptable to me, either with or without

one reservation and qualification." Pl.['s] Decl. in Opp'n to Mot. to Enforce, No. 106-CV-072392 at 8: ¶ 32 (Cal. Super. Ct. Nov. 13, 2008). *See also* J.A. at 462 (letter from Chan to his attorney dated August 19, 2008, indicating that Chan never approved the draft release, dismissal, or stipulation). Assuming as true the threats of Chan's former attorney, nonetheless, the court analyzed the issues of extortion, economic duress, undue influence, fraud, and the constitutionality of mediation confidentiality barring testimony of a mediator.

In the matter of whether barring the testimony from the mediator is a violation of Chan's state and federal constitutional right to due process, the Court determined that "because there is no specific order or ruling in which the court held that Chan was barred from introducing evidence to oppose enforcement of the settlement, we need not address Chan's constitutional argument." Chan v. Lund, *supra,* 188 Cal. App. 4th at 1180. The Court of Appeal dismissed Chan's attorney's offer of proof as "more an offer of hope," *id.*, though (as it is submitted here) little more could have been fairly expected. Nonetheless, the December 11, 2008 supplement to the first *ex parte* motion and the transcript on the second *ex parte* motion thoroughly reflect the due process arguments made to the trial judge before entry of judgment on March 11, 2009, and effectively incorporated therein.

Indeed, Chan's attorney at the time, Bruce Tichinin, stated at the hearing on the second *ex parte* motion:

> **Bruce Tichinin**: I have brought this second application, your Honor, principally because, as I said in the application, the constitutional argument that would allow Mr. Kelly's testimony did not occur to me until after I had actually submitted the initial ex parte application seeking an order of reconsideration on your motion. And while it was pending before you, it occurred to me. I researched it. I found that indeed due process of law includes a right to present evidence. I sent you a letter theorizing that.
>
> The privilege under – or the prohibition on a mediator testifying under Evidence Code Section 1119 was unconstitutional as applied in this case to the extent it prohibited Mr. Kelly's expected testimony corroborating Mr. Chan's statement that Mr. Packard said if you don't take – if you don't settle, I won't represent you tomorrow at trial. And so I meant in the letter that I sent you to be making an offer of proof of that Mr. Kelly's testimony would give that corroboration. And I'm bringing the second application because it's not clear to me from your ruling, which made no mention of Mr. Kelly's proffered testimony or the constitutional argument, that you understood me to be making an offer of proof of Mr. Kelly's corroborating testimony.

Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 12:11-13:4 (Cal. Super. Ct. Mar. 11, 2009).

Judge Cabrinha responded to the offer of proof and denied Chan's motion:

> **The Court**: Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim. I don't think in the law the defendants lose their deal. They've got a deal with the plaintiff. This is a case for money. . . . I see no reason since then to rethink this, to reconsider it, whether on plaintiff's motion or on the Court's own motion, so I'm going to deny the ex parte application that you present today and I'm going to sign the order that's been submitted by Mr. Sunseri on the November 13th hearing. And if you'd like to file this, Mr. Sunseri.
>
> **Mr. Sunseri**: I will do that, Judge.
>
> **The Court**: Today is March 11th.
>
> **Mr. Tichinin**: Thank you, Your Honor.
>
> **The Court**: For the record, Mr. Tichinin, I believe you've withdrawn your consent to the form of the order which you had originally given, but you filed a document here that indicates that you've withdrawn your consent or approval of the order.
>
> **Mr. Tichinin**: That's correct.
>
> **The Court**: Okay. Thank you very much.
>
> * * *

> **Mr. Tichinin**: Your Honor, will the ex parte application be filed or should I file it?
>
> **The Court**: You should file it downstairs so that the record is complete. I've read your papers. Thank you.
>
> **Mr. Tichinin**: Thank you for your patience, Your Honor. I appreciate it.
>
> **Mr. Sunseri**: Your Honor, I'm wondering then, Your Honor, when I file this with the court, right now it does have signatures approving as to form by myself, by Mr. Simoncini and by Mr. Tichinin.
>
> **The Court**: That's fine. But I mean he's made a record of the fact that he's withdrawn his consent after the fact.

Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 13:28-15:11 (Cal. Super. Ct. Mar. 11, 2009).

Chan's offer of proof on his constitutional argument was made to the fullest extent possible via his counsel, Mr. Tichinin. Chan's claim that his due process rights were violated by the application of California's mediation confidentiality law to the enforcement of the mediation settlement agreement is therefore clearly part of the record, despite the Court of Appeal's dismissal of his contentions as purely academic. Had Chan, via his counsel, in fact tried to subpoena the testimony of the mediator Mr. Kelly, without court approval, as a means of providing any better offer of proof, he would have been subject

to attorney's fees and costs. *See* Cal. Evid. Code § 1127.

The facts that 1) Chan responsibly sought new counsel so quickly after being coerced and extorted into signing a mediation settlement agreement and 2) that his new counsel represented him regarding his due process rights so quickly on receiving the case, should be acknowledged, and the due process issues here should be reviewed.

REASONS FOR GRANTING THE PETITION

I. FEDERAL DUE PROCESS HAS BEEN CUT OFF BY CALIFORNIA'S MEDIATION CONFIDENTIALITY LAW. CALIFORNIA COURTS HAVE INCORRECTLY DECIDED THAT THERE ARE NO FEDERAL DUE PROCESS CONCERNS.

However important and however codified, public policy must cede to constitutional rights. A nationwide debate is brewing in federal and state law regarding how stringent mediation confidentiality should be, and it is typically cast solely as a public policy debate. This case presents a due process violation.

Regarding the state of federal law, "the existence, source, and application of mediation confidentiality comprises a crazy lacunae-pocked quilt among the various districts and circuits that comprise the federal judicial branch, providing no predictability to participants in court-mandated mediation, and threatening

the values embodied in what is commonly recognized as the mediation process." Michael P. Dickey, *ADR Gone Wild: Is It Time For A Federal Mediation Exclusionary Rule?,* 25 Ohio St. J. On Disp. Resol. 713, 731-732 (2010). *See also In re* Anonymous, 283 F.3d 627, 634 (4th Cir. 2002) (mediation confidentiality rule did not deprive participants of due process in *collateral* litigation).

Regarding both state and federal law, Professor Maureen A. Weston provides the best introduction to this petition:

> Providing nearly absolute confidentiality for court-connected mediation may be popular public policy, and acknowledging inherent judicial powers can admittedly introduce some uncertainty to the process. However, our system of separation of powers mandates that courts, if they are to be courts, must have a sphere of control over attorneys and participants. The purposes underlying statutory confidentiality can still be achieved through a qualified confidentiality privilege. Constitutional principles make such qualification implicit.
>
> Parties who submit their dispute to the public judicial system have a legitimate expectation of due process and fair treatment, provided they comply with court orders and procedural rules of law. When they are diverted, however temporarily, into court-connected mediation, the court has an obligation to protect that expectation as well as

> the parties' financial, emotional, and intellectual investment in mediation. Where courts offer or require parties to use court-connected mediation, the court has some responsibility to prevent abuse of process. Parties avail themselves of the benefits and protections of the judicial system and unless they can persuade the court that a participation requirement should not apply to them, it is reasonable to require parties to comply with ADR conduct rules set forth by the legislature and courts.
>
> In turning to mediation in order to escape the pitfalls of litigation, the legislature desires to treat mediation as a completely separate and private process. Mediation offers a promising and productive means for parties to achieve understanding and resolution of their differences, but is not immune from the rule of law. Particularly where mediation is a component of the public judicial system, the authority and responsibility of the court cannot be completely divested.

Maureen A. Weston, Confidentiality's Constitutionality: The Incursion On Judicial Powers To Regulate Party Conduct In Court-Connected Mediation, 8 Harv. Negot. L. Rev. 29, 78-79 (2003).

Here, the public policy and California statutes upholding confidentiality pursuant to a mediation session have violated the due process rights of Petitioner Bill Chan. Petitioner Chan respectfully seeks this Court's review to enforce his right to due process.

A. The Circumstance of Mediation Leads To the Peculiar Outcome Here.

Had Chan not involuntarily attended a mediation and not been coerced and extorted "pursuant to" a mediation, he could have sought and introduced the relevant evidence to oppose enforcement. Instead, against his will, Chan's causes of action were irrevocably "expedited."

Mediation confidentiality in California is far more strictly enforced than is confidentiality in regular settlement negotiations. In fact, it is almost a Fort Knox. *Compare* Cal. Evid. Code § 1119 *and* § 1123 *with* § 1152 *and* § 1154; *See also* Peter Robinson, *Centuries of Contract Common Law Can't All Be Wrong: Why the UMA's Exception to Mediation Confidentiality In Enforcement Proceedings Should Be Embraced And Broadened*, 2003 J. Disp. Resol. 135, 148 (2003) ("In the absence of mediation confidentiality, the law of contracts governs settlement agreements. . . . [S]uch sources reflect centuries of experience in defining and articulating fairness and justice in the administration and enforcement of agreements."). The resulting friction is growing stronger every day, and, as here, raises a due process violation.

Regarding legal malpractice actions following mediation, "*Wimsatt* warnings" have even been suggested prior to mediation. This is because "when clients . . . participate in mediation they are, in effect, relinquishing all claims for new and independent

torts arising from mediation, including legal malpractice causes of action against their own counsel." Wimsatt v. Superior Court, 152 Cal. App. 4th 137, 163 (2007). These warnings are advised not only by counsel in the field, but by the California Supreme Court itself in the *Wimsatt* decision: "In light of the harsh and inequitable results of the mediation confidentiality statutes (Evid. Code, § 1115 et seq.), such as those set out above, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute." *Id.* at 164. Of course, there are no such warnings as part of the statutory authorization of mediation in California.

Common law would not have likely permitted the outcome in this case, where a party's own attorney has coerced and extorted his signature to a settlement agreement.

Generally, when a third party coerces a party into an agreement, it is voidable by the victim if the other party to the contract is made aware of the duress before accepting payment. *See* Restatement (Second) of Contracts § 175(2). Further, "[s]tandard contract law for assessing the enforceability of an agreement often requires a review of circumstances occurring during contract formation. . . . Totality of the circumstances specifically includes 'evidence of prior or contemporaneous agreements and negotiation.'" Robinson, *supra*, 2003 J. Disp. Resol. at 149-150. Evidence of prior or contemporaneous agreements and negotiation includes evidence of "illegality, fraud, duress, mistake, lack of consideration or other

invalidating cause." Restatement (Second) of Contracts § 214(d).

California case law would guide a different result here as well. In *Knowlton v. Mackenzie*, 110 Cal. 183, 188 (1893) the California Supreme Court stated that

> as a general rule, a stipulation of the attorney will be presumed to have been authorized by the client, as well in order to uphold the action of the court, as for the protection of the other party to the stipulation; but when the adverse party as well as the court, is aware that the attorney is acting in direct opposition to his client's instructions or wishes, the reason of the rule ceases and the court ought not to act upon the stipulation, *nor can the adverse party claim the right to enforce a judgment rendered by reason thereof.* (Emphasis added.)

See also Linsk v. Linsk, 70 Cal. 2d 272, 276-277 (1969) (attorney is not authorized by virtue of his retention in litigation, to "impair the client's substantial rights or the cause of action itself"). Finally, in *Levy v. Superior Court*, 10 Cal. 4th 578, 584 (1995) the California Supreme Court decided that the mere employment of an attorney to litigate a matter did not give the attorney the implied authority to bind his or her client to a settlement agreement under California Code of Civil Procedure section 664.6. Here, of course, Chan signed the settlement agreement at issue. App. 46-47. But his signature was involuntary at the

hands of his attorney and was therefore effectively *his attorney's stipulation, not Chan's.*

Simply put, an attorney should not be permitted to force a client to settle. Such action breaches more than one duty of the attorney to his client, and should not be enforceable in courts of law. Here, it is even more than a matter of duties owed by an attorney to a client. Here, the California statutory authorization of mediation cut off Chan's due process rights at the moment of his involuntary signature.

B. California's Mediation Confidentiality Law Caused an Unwarned Irrevocable Taking of Chan's Causes of Action via Involuntary Waiver, With No Other Recourse Available.

The Fourteenth Amendment to the United States Constitution states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." Chan's property interests in his causes of action against the Lunds were irrevocably taken by California's mediation confidentiality law as applied.

Chan's attorney committed extortion on Chan by threatening to abandon Chan on the eve of trial if Chan did not submit to mediation and sign the mediation settlement agreement before him. Chan, ignorant of his due process rights, grudgingly succumbed and subsequently sought new counsel. Under California mediation law, Chan received no warning that his common law remedies, such as rescission, would be

unavailable as to his involuntary signature on the mediation settlement agreement, or indeed that he would have *no* recourse available whatsoever. *See* Wimsatt v. Superior Court, *supra*, 152 Cal. App. 4th at 163.

Generally, parties are informed that the signing of a settlement agreement constitutes a waiver of the right to continue pursuing the causes of action settled, and this legal informational step may typically constitute the process due before the taking.

Here, however, is a situation of the denial of due process before the statutory taking of Chan's causes of action. To classify Chan's lost property interests as waived by his participation, as the Court of Appeal has effectively done, violates due process because both Chan's attendance and participation relevant to signing the mediation settlement agreement were involuntary and coerced. "Waiver is the intentional relinquishment of a known right, or intentional conduct inconsistent with claiming that right. . . . There can be no waiver unless it is so intended by one party and so understood by the other." Avary v. Bank of America, 72 S.W.3d 779, 788 (Tex. Ct. App. 2002). Chan's relinquishment of his causes of action was involuntary and coerced, the other parties knew that it was involuntary before enforcing the settlement agreement against Chan, and Chan could prove both if he could get the evidence. That by California law he should now have absolutely no recourse is a violation of his constitutional right to due process.

Chan involuntarily relinquished his causes of action and cannot be said to have recourse by way of a malpractice suit against his attorney, all according to California law. As applied to his causes of action against the Lunds, his right to due process has therefore been cut off.

C. California's Mediation Confidentiality Law Is Unfairly One-Sided As To Admissibility of Evidence In the Circumstance of Involuntary Signatures To Mediation Settlement Agreements.

Chan did not waive his constitutional right to due process at any time, and should not be presumed to have done so simply because California's draconian statutory scheme is established in such a manner. "Courts will not presume acquiescence in the loss of a fundamental constitutional right." Rinaker v. Superior Court, 62 Cal. App. 4th 155, 168 (1998). Yet, this is effectively what happened to Chan when he was coerced into signing the settlement agreement.

California Evidence Code section 1119 renders inadmissible "anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." California Evidence Code section 1123 and California Code of Civil Procedure section 664.6 allow introduction of the settlement agreement and enforcement of the settlement agreement. In situations as here, where the settlement agreement was signed only as the

result of coercion, this produces a due process violation. The party seeking to enforce the agreement may introduce it and have it enforced. The party who involuntarily signed and seeks to oppose enforcement has no opportunity to do so. Bill Chan is such a party who unfairly lost all opportunity to pursue his causes of action when his attorney caused him to involuntarily sign the settlement agreement.

D. The Concurring Opinion of Justice Chin In *Cassel v. Wasserman* Speaks To the Breadth of Potential Violations.

In *Cassel v. Wasserman*, 51 Cal. 4th 113 (2011), the California Supreme Court again just affirmed a strict application of California's mediation confidentiality statutes after repeated and continuing challenges:

> We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580, 80 Cal.Rptr.3d 83, 187 P.3d 934 (*Simmons*); *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194, 51 Cal.Rptr.3d 871, 147 P.3d 653 (*Fair*); *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416, 15 Cal.Rptr.3d 643, 93 P.3d 260 (*Rojas*); *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001)

> 26 Cal.4th 1, 13-14, 17, 108 Cal.Rptr.2d 642, 25 P.3d 1117 (*Foxgate*).)

Id. at 118.

Indeed, as to mediation confidentiality exceptions, the California courts acknowledge only the due process right to confront witnesses in criminal matters, not the due process right to obtain evidence in a civil matter no matter the circumstances.

The only due process exception to strict mediation confidentiality acknowledged by the California courts is where evidence is needed to defend against a criminal prosecution. Rinaker v. Superior Court, *supra*, 62 Cal. App. 4th at 167 (mediator required to testify where juvenile's due process right to confront witnesses outweighed mediation confidentiality). *See also* Cassel v. Wasserman, 51 Cal. 4th 113, 127 (2011) ("We determined that *Simmons*, '[l]ike *Foxgate* and *Rojas*, . . . [did] not implicate any due process right equivalent to the right bestowed by the confrontation clause of the United States Constitution, nor ha[d] the parties executed express waivers of confidentiality.'" Citing Simmons v. Ghaderi, 44 Cal. 4th 570, 583 (2008).)

In fact, the *Cassel* Court expressly concluded that "mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest." Cassel v. Wasserman, *supra*, 51 Cal. 4th at 135.

Justice Chin concurred in the result in *Cassel*, "but reluctantly." Cassel v. Wasserman, *supra*, 51 Cal. 4th at 138. Justice Chin summarized the result of the *Cassel* decision:

> Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. (See maj. opn., ante, 119 Cal.Rptr.3d at p. 455, fn. 11, 244 P.3d at p. 1096, fn. 11.) *This is a high price to pay* to preserve total confidentiality in the mediation process.

Cassel v. Wasserman, *supra*, 51 Cal. 4th at 138, emphasis added.

The high price paid here is a due process violation, because fraudulent action under the statutory design of California's Evidence Code caused Chan to surrender irrevocably his causes of action with no meaningful opportunity to be heard on the involuntary nature of his signature.

II. STATE ACTION ESTABLISHES AND CONDUCTS MEDIATION. THUS, DUE PROCESS MUST BE APPLIED TO THE PROPERTY INTERESTS IN CHAN'S CAUSES OF ACTION.

A. Property Interests In Causes of Action Are To Be Afforded Due Process Protection.

Causes of action are property interests protected under due process. Logan v. Zimmerman Brush Co.,

455 U.S. 422, 428-429 (1982); Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) (trust beneficiaries' rights to pursue potential claims of negligence against fiduciaries cut off by lack of due process). Chan must therefore be afforded due process of law before California would deprive him of his causes of action.

B. State Action Establishes Mediation and State Action Caused the Loss of Chan's Causes of Action.

The mediation dispute resolution process is composed by state action. State law establishes and regulates the process. *See* Cal. Evid. Code §§ 1115 – 1128; Cal. Civ. Proc. Code §§ 664.6; 1775-1775.15. Attorneys representing clients are licensed by the State. The enforcement of a mediation settlement agreement by a court of law is state action. *See* Shelley v. Kraemer, 348 U.S. 1 (1948). Further, civil dispute resolution is a traditional public function. See Evans v. Newton, 382 U.S. 296 (1966); Edmonson v. Leesville Concrete, 500 U.S. 614 (1991). At every level, mediation is comprised of, or at minimum, filled with, state action. *See also* Weston, *supra*, 8 Harv. Negot. L. Rev. at 78-79.

Here, where Chan's attorney coerced and extorted Chan to sign the settlement agreement of August 4, 2008, state action caused the deprivation of property interests without due process. The issue of state

action in court-sponsored mediation needs this Court's review.

One federal court has considered whether the arbitration process could be deemed state action, but in different circumstances and with a different purpose. United States v. Gullo, 672 F. Supp. 99, 103 (D. W.D.N.Y. 1987) ("The Fifth and Fourteenth Amendments are implicated, however, only if the arbitration process is found to be government action.") In *Gullo*, Mr. Gullo underwent criminal prosecution and sought, among other motions, to have suppressed statements he made during an arbitration session. He argued for suppression on constitutional grounds. The United States District Court for the Western District of New York found that no state action caused him to make the statements during arbitration, thereby disagreeing with his constitutional argument.

In briefly attempting to analyze whether the arbitration process could be deemed state action, the *Gullo* Court cited the United States Supreme Court decision in *Colorado v. Connelly*, 479 U.S. 157, 166 (1986): "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *See* United States v. Gullo, *supra*, 672 F. Supp. at 103. Indeed, private action could not constitute a due process violation. Here, however, the outrageous behavior was committed by a state-licensed attorney in the court-sponsored mediation process. Moreover, at issue in *Gullo* was Mr. Gullo's own decision to make certain statements and

"it [was] not clear that Gullo's decision to speak had been made after consultation with counsel." *Id.* Here, it was state-licensed counsel himself who coerced and extorted Chan to sign the ultimate agreement, thus forever sealing his fate to surrender his causes of action.

This case is also unlike *Gullo* and the case cited for support therein, where "there was no certainty what penalty NYSE would prescribe if Solomon refused to speak." United States v. Solomon, 509 F.2d 863, 872 (1975). It was clear that Chan was involuntarily surrendering his causes of action on the coercion and extortion of his attorney. In Chan's circumstances under California law, his attorney was in the position of being his sole due process guardian. Among his duties was a duty to refrain from forcing Chan to surrender his property interests in his causes of action, and he failed to meet that duty.

The District Court in *Gullo* considered *only* whether the arbitration process *as a whole* could constitute state action. This Court is asked to consider the nature of the state action imposed on Chan with regard to his civil rights prior to surrendering his property interests in his causes of action, whether viewing California's mediation statutes as a whole or on these particular facts of attorney coercion and extortion of his own client. There are many reasons Justice Chin says "This is a high price to pay," *Cassel v. Wasserman*, *supra*, 51 Cal. 4th at 139, and one of them is demonstrated here. Even if considered only

on the limited circumstances of Chan's case, a due process violation has taken place.

Chan was not even informed that he could have contested the mediation proceedings altogether. In California, cases such as Chan's are routinely being sent to ADR, but are exempt if the amount in controversy exceeds $50,000. Cal. Civ. Proc. Code § 1141.11(a); Cal. Rules Ct. R. 3.811(b)(8). Chan alleged damages of at least $78,000. App. at 2. He was not warned he could contest the use of mediation altogether. He was not warned he would give up his right to sue for malpractice. Above all, he was afforded no meaningful opportunity to show that his signature was involuntary, thereby cutting off rights to his property interests in his causes of action without due process of law.

III. CALIFORNIA'S MEDIATION CONFIDENTIALITY LAW DOES NOT MEASURE UP TO THE DUE PROCESS STANDARDS ESTABLISHED BY THIS COURT.

In *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), this Court found that the rights of certain trust beneficiaries were cut off by the statutory scheme at issue therein. Under New York Banking law establishing the trusts in that case, *id.* at 309, beneficiaries with known addresses were given notice of pendency of action by newspaper publication only. This was not enough to satisfy due process. Here, as in *Mullane*, the State became the caretaker of Chan's causes of action because the State of California has

created, sanctioned, and sponsored the mediation. The resemblance to *Mullane* is seen in the following excerpt of the opinion regarding the fiduciary: "But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so." *Id.* at 316. In Chan's case, his attorney became Chan's sole due process guardian, Chan's sole protector of his civil rights. His attorney became the only guardian through the California law establishing the mediation. No one else was expected to keep his causes of action out of jeopardy.

Other states, such as Texas and Virginia, have mediation confidentiality and settlement enforcement statutes which do appear to comply with federal due process, from the confidentiality provisions to the enforcement of the settlement agreement. This Court should review California's mediation confidentiality law and enforcement procedure to require that California also comport with due process.

Under Texas law regarding mediation confidentiality, "evidence that is discoverable independent of the alternative dispute resolution procedure is discoverable regardless of its use in the procedure." Avary v. Bank of America, *supra*, 72 S.W.3d at 792; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 154.073(c) ("An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.") In *Avary, in camera* proceedings

were authorized to gather evidence from a mediation session regarding an alleged breach of fiduciary duty, not even by one of the party's attorneys, but by one of the parties themselves, Bank of America. Chan's need is to compel evidence of his own attorney's coercion and extortion. As in *Avary*, this is clearly a matter "that may be proved without disturbing the confidentiality of the mediation." *Id.*

Texas is not firmly decided on the stringency of mediation confidentiality, however. In *Alford v. Bryant*, 137 S.W.3d 916, 922 (Tex. Ct. App. 2004) the Court of Appeals there pointed out that there appears to be a conflict between Texas Civil Practice & Remedies Code sections 154.053 and 154.073. Section 154.053 appears absolute (perhaps like the California law at issue here) and section 154.073 allows for limited exceptions. *Id.* The court did not decide that issue, however, because confidentiality had been sufficiently waived. *Id.*

Under Virginia law regarding mediation confidentiality:

> Confidential materials and communications are not subject to disclosure . . . except
>
> * * *
>
> (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime,
>
> * * *

> (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation,
>
> (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-576.12 in a proceeding to vacate a mediated agreement, or
>
> (ix) as provided by law or rule.

Va. Civ. Prac. & Rem. Code Ann. § 8.01-576.10.

Virginia thus properly excepts from confidentiality communications necessary to prove malpractice, communications necessary to vacate a mediated agreement, and also respects any other "law or rule." California's mediation confidentiality statutes simply bar all disclosure, unless every single party waives confidentiality or unless the agreement itself is proof of some other illegality. Cal. Evid. Code §§ 1119, 1123.

Furthermore, California's provision for enforcing mediation settlement agreements conflicts with the holding of this Court in *Hall v. Mattel*, 552. U.S. 576, 590 (2008). This Court in *Hall v. Mattel* would not allow judicial review of an arbitration agreement according to terms beyond those listed in the Federal Arbitration Act. In other words, the arbitration agreement could not spell out further terms for its own enforcement.

The California enforcement provision allows a California state court to "enter judgment *pursuant to*

the terms of the settlement." Cal. Civ. Proc. Code § 664.6, emphasis added. The Texas statute, on the other hand, properly requires compliance with contract law and constitutional law: "If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable *in the same manner as any other written contract.*" Tex. Civ. Prac. & Rem. Code § 154.071, emphasis added.

California law gives too much power to the strictness of confidentiality in mediation proceedings and enforcement of any settlement produced therefrom. The California Supreme Court has recognized this. Wimsatt v. Superior Court, *supra*, 152 Cal. App. 4th at 163 ("We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served.") Cassel v. Wasserman, *supra*, 51 Cal. 4th at 457-459 (Chin, J., concurring.). The California Legislature has taken no action in response. In this petitioner's case, this power has violated federal due process by jeopardizing and taking causes of action of an unsuspecting and involuntary participant.

CONCLUSION

A coerced signature to a mediation settlement agreement should not be judicially enforceable. For good reason, Justice Chin said that allowing fraudulent conduct by an attorney in mediation "is a high price to pay to preserve total confidentiality in the

mediation process." Cassel v. Wasserman, *supra*, 51 Cal. 4th at 458. Petitioner Chan respectfully seeks this Court's review because his property interests in his causes of action were taken by state action, without due process of law.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BILL CHAN, Plaintiff and Appellant, v. CRAIG T. LUND et al., Defendants and Respondents.	H034196 (Santa Clara County Super.Ct.No. CV072392) (Filed Sep. 29, 2010)

This five-year-old dispute arises out of the cutting of a number of Leyland cypress trees on Bill Chan's Los Altos property adjacent to a fence separating his property and the property of Craig and Kathleen Lund (the Lunds). The Lunds hired an unlicensed tree contractor, Norma Gonzalez, dba Norma Tree Service (Norma Tree), to trim the trees, which had branches that extended onto the Lunds' property. Chan brought suit against the Lunds and (later) Norma Tree. The lawsuit was purportedly settled on the eve of trial in August 2008 in proceedings before a mediator, and the terms of the purported settlement were reduced to writing. Shortly thereafter, Chan discharged his attorney, hired new counsel, and claimed that his consent to the purported settlement was obtained through economic duress, undue influence, and fraud employed by his former attorney. The court granted the Lunds' and Norma

Tree's motions to enforce settlement under Code of Civil Procedure 664.6, and Chan appealed from the judgment entered thereon.

Chan makes a number of arguments on appeal. He argues, among other things, that because his former attorney extorted Chan's consent to the settlement, the purported agreement is void, and therefore enforcement of the settlement contravenes public policy. He contends further that he is entitled to rescind any agreement of settlement under theories of economic duress, undue influence, and fraud. Chan also asserts that Evidence Code provisions concerning the confidentiality of communications during mediation and precluding testimony by the mediator in subsequent proceedings are unconstitutional under the Due Process Clause of the United States and California Constitutions as applied in this instance, because such mediation confidentiality deprived him of the ability to present evidence (i.e., the mediator's testimony) to establish that Chan's consent to the settlement was coerced.

We conclude that the court did not err in enforcing the settlement and will affirm the judgment.

PROCEDURAL BACKGROUND

Chan filed a complaint against the Lunds on October 5, 2006. He alleged claims for trespass and negligence, averring that his damages were at least $78,000. Chan also asserted that defendants' actions constituted wrongful injuries to trees in violation of

Code of Civil Procedure section 733 and Civil Code section 3346, subdivision (a), entitling him to treble damages. He later amended his complaint to identify Norma Tree as a defendant previously referred to as Doe 1, claiming that Norma Tree was the contractor hired by the Lunds to cut and trim the row of 14 Leyland cypress trees on Chan's property.[1]

Trial was set for August 4, 2008.[2] The court vacated the scheduled mandatory settlement conference and permitted the parties to continue settlement negotiations with a mediator, Kevin Kelly. The record reflects that the court thereafter scheduled the case for a dismissal hearing based upon its having received notice of a settlement. On September 22, Chan filed a substitution of attorney, substituting Bruce Tichinin in place of his former attorney. In October, the Lunds and Norma Tree filed separate motions to enforce settlement pursuant to Code of Civil Procedure section 664.6. It was asserted in both motions that on August 4, the parties attended a mediation before Kelly and that on that date, a settlement was achieved (the Settlement) that resulted in the creation of a writing memorializing the settlement (the Settlement Memorandum).[3] The Settlement Memorandum

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[1] The Lunds and Norma Tree are hereafter collectively referred to as defendants.

[2] All dates are 2008 unless otherwise stated.

[3] We use "Settlement" and "Settlement Memorandum" as terms of art to refer to the purported settlement of the parties after mediation on August 4 and the confirmation in writing

(Continued on following page)

(captioned "Confirmation of Settlement as a Result of Mediation") recited that the parties "have reached a full and final settlement of all of the claims of said plaintiff in said case," and that Chan would be paid a total of $36,100 by two insurance carriers in full settlement of known and unknown claims that he had in the case.[4]

Chan opposed the motions. As discussed in greater detail below, he contended that the Settlement was voidable because his purported consent was "wrongfully coerced" through tactics of his former attorney that "amounted legally to duress, undue influence, fraud, prohibited financial dealing with a client in violation of the [California] Rules of Professional Conduct, and undisclosed dual agency."[5] (Hereafter, all rules are the California Rules of Professional Conduct unless otherwise specified.) The attorney's alleged coercion was essentially twofold. First, he allegedly threatened on the eve of trial to withdraw from the case if Chan refused to participate in a

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thereof, respectively. In using these terms as a matter of convenience, we acknowledge that Chan disputes the enforceability of the Settlement as described in this appeal.

[4] Of the total settlement funds, $11,100 was to be paid by State Farm Insurance Company on behalf of the Lunds, and $25,000 was to be paid by Colony Insurance Company on behalf of Norma Tree.

[5] As discussed, *post*, Chan renews these arguments on appeal, save the undisclosed dual agency claim, which has therefore been abandoned. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

further session with Kelly or if Chan refused to make concessions to settle the matter. Chan alleged that his attorney failed to advise him at the time he made these threats that he would be required to obtain court approval to withdraw from the case and that there were ethical rules prohibiting such withdrawal where reasonable steps are not taken to avoid prejudicing the client's rights. Second, during mediation, the attorney allegedly induced Chan to accept the Settlement by agreeing to discount his fees by $10,000 in exchange for Chan's agreement.

After a hearing, the court announced orally on November 13 that it would grant the motions to enforce settlement as to the terms of the monetary settlement recited in the writing.[6] The court observed further that although the writing recited a stipulation for injunctive relief that the parties contemplated finalizing in the future, there was no complete agreement concerning such stipulation that could be enforced.

On or about November 25, Chan, through his new attorney, Tichinin, filed an ex parte application (first ex parte application) for an order that the court on its own motion reconsider its decision (see *Le Francois v. Goel* (2005) 35 Cal.4th 1094). He asserted that there was additional evidence – namely,

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[6] The joint appendix contains no contemporaneous minute order confirming the court's announcement of its decision from the bench.

correspondence to Chan from his prior counsel – that corroborated Chan's claim that the attorney had offered to reduce his fees by $10,000. On or about December 11, Tichinin supplemented the first ex parte application with a lengthy letter brief, arguing that the court should reconsider its decision for the additional reason that he "believed" that if the mediator, Kelly, were allowed to testify, he would further corroborate Chan's declaration that his attorney at the mediation threatened to abandon Chan if Chan refused to make concessions to settle the case. On December 22, the court denied Chan's first ex parte application.

On March 11, 2009, Tichinin filed a second ex parte application for an order that the court on its own motion reconsider its decision (second ex parte application). In it, Tichinin expressed a concern that he had not previously communicated to the court adequately that an additional basis for reconsideration (beyond the corroboration that Chan's former attorney had agreed to discount his fee) was that Tichinin "was making *an offer of proof* that Mr. Kelly's constitutionally-admissible testimony would corroborate Mr. Chan's testimony that [his attorney] threatened to abandon him at trial the next day in the manner described in Mr. Chan's declaration." (Original underscoring.) On March 11, 2009, the court denied the second ex parte application, and filed a formal order granting the motions to enforce settlement and entering judgment on that order. Chan filed a timely notice of appeal.

DISCUSSION

I. *Motions to Enforce Settlement Under Code of Civil Procedure Section 664.6*

Code of Civil Procedure section 664.6 provides as follows: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

The Second District Court of Appeal, Division Two, has succinctly described the nature of motions brought pursuant to Code of Civil Procedure section 664.6: "Section 664.6 was enacted to provide a summary procedure for specifically enforcing a settlement contract without the need for a new lawsuit. [Citations.] . . . Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 809-810; see also *Terry v. Conlan* (2005) 131 Cal.App.4th 1445 [court erred in granting section 664.6 motion where record demonstrated no

meeting of minds concerning material terms of settlement].)

The trial court's factual findings on a motion to enforce a settlement under Code of Civil Procedure section 664.6 "are subject to limited appellate review and will not be disturbed if supported by substantial evidence." *(Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162.) In instances involving questions of law, including the construction and application of the statute, the trial court's decision is not entitled to deference and will be subject to independent review. (*Ibid.*) For example, where the principal claim of error "raises a question of law concerning the construction and application of [Code of Civil Procedure] section 664.6[,] . . . it requires independent appellate review. [Citations.]" (*Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1116, fn. omitted (*Gauss*).)

II. *Challenge to Order Enforcing Settlement*

A. *Background and Contentions*

1. *Chan's declaration*

In his declaration in opposition to defendants' motions to enforce settlement, Chan stated by way of background that between October 2007 and July 2008, the parties had held four mediation sessions before Kelly. Chan noted that "[a]t these sessions, the parties agreed provisionally to monetary settlement at the monetary amounts" set forth in the later written confirmation of Settlement of August 4. But he went on to declare that "[t]he provision required to

make the monetary amounts effective was that agreement would also be reached as to the terms of a stipulation for an injunction concerning the rights and duties of the parties regarding trees on [Chan's] property in the future." Chan's attorney had prepared a draft stipulation in May, but the counterproposal from the Lunds, Chan felt, was "so severely invasive of [his] rights that" progress toward agreement on the form of a stipulation for injunction ceased.

Ten days before trial, on July 25, while Chan was attending an expert witness deposition, the Lunds' attorney indicated that there would be a delay in trial because there was going to be another mediation session; after Chan's attorney indicated his agreement, Chan objected to the mediation. Chan renewed his objection to his attorney privately after the deposition concluded, telling him that he assumed Kelly expected to be paid; Chan indicated "I won't pay and I won't attend." (Italics omitted.) On August 3, while preparing for trial, Chan again told his attorney that he refused to attend the mediation the next day. The attorney told him that it would reflect badly on his reputation and "the Judge in the case would give him a hard time at trial" if Chan did not attend the mediation. Chan suggested that he wanted to speak directly with the court; his attorney said that the court would not speak with Chan and that if he did not attend the mediation, he would not represent him at trial and he would be self-represented. He did not disclose to his client that he could not withdraw from representing him without court permission and that rule 3-700

required that he take reasonable steps to avoid foreseeable prejudice to his client before withdrawing.

Chan attended the mediation session before Kelly on August 4; he went there to find out whether his attorney was going to represent him at trial the next day if Chan's settlement position remained that he would not agree to terms other than those in the draft stipulation his attorney had prepared in May. Because his attorney confirmed that he would represent him at trial, Chan stayed. After Kelly arrived and discussed concessions that the Lunds were willing to make, Chan responded that he would only approve the stipulation as prepared by his counsel in May. Chan's attorney then "stated that [Chan] was not negotiating, and that he would not represent [Chan] at trial the next day." Chan then responded that he intended to leave so that he could find new counsel. Kelly asked Chan to stay until he could inform the other participants and he then returned with a new proposal that involved settling the monetary portion of the case and leaving the case open as to the stipulation for injunction with the Lunds.

At that point, the attorney – without rescinding his threat to abandon Chan if the matter proceeded to trial – sought to induce Chan to settle both the monetary aspects of the case and the stipulation for injunction by agreeing to discount his fee by $10,000, if Chan would agree to the terms set forth in the writing confirming the Settlement. Chan declared that because he was afraid that his attorney "would carry out his renewed threat not to represent [Chan] at

trial the next day," and because Chan was ignorant of the requirements of rule 3-300 concerning an attorney having a business transaction with his or her client, Chan signed the Settlement Memorandum. Chan declared that he did so "against [his] will and better judgment" only due to his attorney's threat to withdraw and because he was unaware of the Rules of Professional Conduct.

2. *Chan's Contentions*

Chan contends that the court erred in granting defendants' motions to enforce settlement under Code of Civil Procedure section 664.6. He asserts that because his consent was the result of extortion, the Settlement constituted a void contract that was unenforceable. Chan also contends that his attorney's actions constituted economic duress, undue influence, fraud, and an invalid business transaction between an attorney and his client. Since his consent to the Settlement was procured by the attorney's unlawful conduct, Chan asserts that he was entitled to rescind the Settlement contract. Chan argues further that although mediators are generally prohibited by statute from testifying about any statement or conduct occurring at mediation in a subsequent proceeding (Evid. Code, § 703.5),[7] and no party may compel such

[7] "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, . . . " (Evid. Code, § 703.5.)

testimony of a mediator (Evid. Code, § 1127),[8] the application of statutes enforcing such mediation confidentiality here deprived him of due process because Kelly's testimony would have corroborated Chan's claim that his purported consent to the Settlement was coerced.

Chan asserts that we are required to review the trial court's decision independently because his opposition to the motions and the court's rejection of that opposition were founded on questions of law rather than fact.[9] In contrast, Norma Tree argues that the court's decision here is governed by the substantial evidence standard.[10] In its order, the trial court did

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[8] "If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, . . . and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing." (Evid. Code, § 1127.)

[9] Chan bases this argument largely upon the assertion that, based upon the comments of the court at the hearing on the second ex parte application, the court viewed [it]self as deciding a question of law. But "'[a]n oral . . . opinion by a trial judge, discussing and purporting to decide the issues, . . . is merely an informal statement of his views. . . . [I]t is not itself the decision of the court or a judgment. [Citations.]' [Citation.]" (*Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 77-78.)

[10] The Lunds do not specifically address standard of review in their brief. They, however, spend the majority of their discussion arguing legal issues such as the inadmissibility of any testimony by the mediator, whether the offer of Chan's attorney to discount his fees constituted a business transaction under the Rules of

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not specifically indicate the basis for its conclusion that the Settlement – at least as to the monetary terms – should be enforced. It therefore may have concluded that the Settlement on its face was enforceable under Code of Civil Procedure section 664.6, and that, Chan's declaration notwithstanding, it did not believe that Chan was subjected to duress from his attorney. Alternatively, the court may have concluded that, even assuming the truth of everything stated in Chan's declaration, he was nonetheless not legally entitled to rescind or avoid the Settlement. The latter conclusion – which appears to be the more likely reasoning of the court – involves questions of law as to the potential application of Chan's arguments in opposition to enforcement of the Settlement that would be subject to de novo review. (*Gauss*, *supra*, 103 Cal.App.4th at p. 1116.)

We address Chan's contentions below, applying principally a de novo standard of review in deciding whether, assuming that his attorney threatened to withdraw as his counsel and offered to discount his fee as detailed in Chan's declaration, Chan was entitled to rescind or avoid the Settlement Memorandum he admittedly signed and thereby prevent enforcement of the Settlement.

Professional Conduct, and whether there was a legal basis for rescission. They also argued that there was no evidence supporting Chan's claim of extortion.

B. *Extortion*

Chan argues that his purported consent to the Settlement was obtained by his attorney through extortion in violation of Penal Code section 518, and that once he had established this fact in opposition to the motions, defendants' continued attempt to enforce the Settlement constituted buying property obtained through extortion in violation of Penal Code section 496, subdivision (a). He contends that the court's granting of defendants' motions to enforce "constituted aiding [and abetting] in the selling of property" obtained by extortion. Chan asserts that therefore the Settlement was a void contract that could not be enforced. Notably, he cites no authority that would support his contentions that his attorney and defendants violated Penal Code sections 518 and 496, subdivision (a), respectively.

"Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." (Pen. Code, § 518; see also *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326 (*Flatley*).) Fear for purposes of extortion may be accomplished by a threat "[t]o do an unlawful injury to the person or property of the individual threatened or of a third person. . . ." (Pen. Code, § 519)[11] Attorneys are not exempt from the

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[11] "Fear, such as will constitute extortion, may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his,

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principles of extortion in their professional conduct. (*Flatley,* at p. 327; see also *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 318 [attorney's assistance to client in presenting State Bar complaint about associated counsel done to coerce that counsel's signature on settlement check constituted extortion].) Additionally, a person who buys or receives property knowing that it has been stolen or obtained through extortion is guilty of a crime under Penal Code section 496, subdivision (a).[12]

Chan contends that his attorney committed extortion. He argues that the threat to abandon him at trial – and in particular without complying with the legal requirements of rule 3-700[13] constituted a

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or member of his family, of any crime; or, [¶] 3. To expose, or to impute to him or them any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him or them." (Pen. Code, § 519.)

[12] "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. . . ." (Pen. Code § 496, subd. (a).)

[13] "(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission. [¶] (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." (Rule 3-700(A).)

wrongful threat to do injury to Chan's property, namely, his causes of action against defendants asserted in the case. Chan contends further that defendants – by pursuing enforcement of the Settlement after becoming aware of Chan's assertion that his signature on the Settlement Memorandum was obtained through extortion – were themselves guilty of violating Penal Code section 496, subdivision (a), because in doing so, they purchased property (i.e., Chan's claims) knowing that the sale of the claims was obtained through extortion.

In his argument, Chan fails to cite to the record in support of his claim that his signature on the Settlement Memorandum was obtained through extortion. Further, assuming that his extortion claim is based upon the circumstances surrounding the August 4 mediation session and Chan's execution of the Settlement Memorandum discussed in the "Statement of Facts" section of his opening brief,[14]

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[14] We observe that Chan's opening brief is noncompliant in that it fails to contain proper citations to the appellate record (i.e., the joint appendix) supporting factual matters recited in the brief purportedly appearing in the record below. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [any matters referenced from the record in appellate briefs must be supported "by a citation to the volume and page number of the record where the matter appears"].) In instances where an appellate brief's noncompliance with this rule is substantial, the court may order the brief stricken. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990.) We have nonetheless overlooked this noncompliance and have considered the contentions and factual assertions made by Chan in his brief.

we are nonetheless dubious that he made a prima face [sic] showing of extortion.

In order to establish extortion, "the wrongful use of force or fear must be the operating or controlling cause compelling the victim's consent to surrender the thing to the extortionist. [Citation.]" (*People v. Goodman* (1958) 159 Cal.App.2d 54, 61 (*Goodman*).) Here, it is doubtful that Chan presented evidence below establishing that his attorney's alleged wrongful use of fear – i.e., the alleged threat to withdraw – was the operating or controlling cause of Chan's execution of the Settlement Memorandum.

Chan stated in his declaration that as a result of his attorney's first threat on August 3 to abandon him, he attended the mediation session the next day (that he had otherwise told his attorney he would not attend) in an effort to persuade his attorney to retract his threat of abandoning him. According to Chan's declaration, the attorney initially told him on August 4 that he intended to represent him at trial, and then later during mediation stated that he would not do so because Chan "was not negotiating. . . ." Chan stated that as the mediation proceeded, his attorney, "without rescinding his threat of abandonment, and to further induce [Chan] to accept *both* the monetary settlement and the terms of the stipulation for injunction set forth in [the Settlement Memorandum], which contains language with additional constraints on [Chan's] interests that were not included in the May, 2008 proposed stipulation for injunction," offered to discount his fee by $10,000 if Chan would agree to the injunctive terms as well as the monetary

terms in the Settlement Memorandum. But by the very terms of the Settlement Memorandum, the monetary terms were "not conditioned or contingent on the parties . . . reaching or entering into [a] stipulated injunctive order." This point was reiterated on the second page of the Settlement Memorandum, where it was stated that the general release of claims as between Chan and the Lunds "shall not apply . . . as to any injunctive claims in the event that they cannot agree on and execute a Stipulation for Injunctive Orders." And because the Settlement Memorandum provided expressly that the monetary settlement and releases in connection therewith were not contingent on the ultimate agreement of Chan and the Lunds to the stipulation for injunction, the court's order expressly limited enforcement to the monetary settlement only. Thus, Chan's statement that his attorney's actions resulted in his execution of the Settlement Memorandum notwithstanding, it is unclear – given that Chan had "provisionally" agreed in May to the monetary terms of the ultimate Settlement after earlier mediation sessions, and the Settlement, by its own terms, did not include a stipulation for injunctive relief that Chan claims was coerced by the attorney – that his alleged threat to withdraw from the case was the "operating or controlling cause compelling" Chan to sign the Settlement Memorandum. (*Goodman*, *supra*, 159 Cal.App.2d at p. 61)[15]

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[15] This doubt as to whether the attorney's actions caused Chan to sign the Settlement Memorandum is underscored by Chan's subsequent actions affirming the settlement, notably,

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Moreover, even were Chan to have established that his attorney's threatened withdrawal was the operating or controlling cause of Chan's execution of the Settlement Memorandum, extortion contemplates the surrender by the victim of his or her property to the extortionist as a result of the force or fear employed by the extortionist. (Pen. Code, § 518; *Goodman*, *supra*, 159 Cal.App.2d at p. 61.) Here, the property Chan contends was subject to the alleged extortion (i.e., his claims in the lawsuit) was surrendered *to defendants* in exchange for separate payments made by defendants' insurers, and not to the alleged extortionist, Chan's attorney. For this additional reason, we find that Chan's claim of extortion lacks merit. (See *Wolk v. Green* (N.D.Cal. 2007) 516 F.Supp.2d 1121, 1129-1130 [client failed to state cause of action for extortion under Pen. Code, § 518, based upon attorney's threat of withdrawing from representation of client in defamation suit unless she provided additional funds to attorney].)

Finally, even were we to conclude that Chan had presented a factual basis for extortion, we nonetheless reject his contention that defendants' pursuit of the motions to enforce settlement constituted a violation

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(1) his transmittal of a W-9 form to his attorney on August 5 that was requested by Norma Tree's attorney to conclude the Settlement; and (2) the communication on August 12 from Chan's attorney to Norma Tree's attorney, indicating that Chan had only "'one reservation and qualification'" concerning the settlement documents that concerned the proposed stipulation for injunction.

of Penal Code section 496, subdivision (a). That statute requires that the party receiving the stolen property or property obtained through extortion do so knowingly. There is no evidence of any awareness by the Lunds or Norma Tree on August 4 that Chan's signature on the Settlement Memorandum was obtained through extortion. Chan admits that defendants had no such knowledge at the time of the final mediation session. But Chan contends that once he filed opposition to defendants' motions detailing his claim that Chan's execution of the Settlement Memorandum was the result of his attorney's extortion, defendants' continued pursuit of enforcement of the Settlement amounted to knowingly receiving extorted property in violation of Penal Code section 496, subdivision (a). We disagree. We know of no authority – and Chan has cited none – suggesting that an adverse party seeking to enforce an agreement to settle commits a violation of section 496, subdivision (a), merely by becoming aware during the pendency of the motion of an uncorroborated, unadjudicated claim of another party that his or her consent was not freely given.[16]

Accordingly, we reject Chan's contentions that the court should not have enforced the Settlement because Chan's execution of the Settlement Memorandum was

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[16] We likewise reject Chan's novel contention unsupported by precedent that the court aided and abetted defendants' violation of Penal Code section 496, subdivision (a), by granting the motions to enforce settlement.

obtained through extortion or because defendants' motions to enforce constituted violations of section 496, subdivision (a) of the Penal Code.

C. *Rescission of Settlement Agreement*

Chan contends that as a result of his attorney's conduct, the settlement agreement was subject to rescission under various legal theories. He argues that his consent was procured by (1) economic duress; (2) undue influence, both because the attorney engaged in an invalid business transaction with his client, Chan, and because the attorney generally took unfair advantage of him; and (3) fraud. As was the case with his extortion argument (see pt. II.B. and fn. 14, *ante*), Chan has failed to cite to specific portions of the appellate record in support of these assertions. We nonetheless address these theories on their merits below.

1. *Economic duress*

Chan argues that his attorney's conduct constituted economic duress that rendered Chan's apparent consent as reflected in the Settlement Memorandum not real or free. He contends that the attorney's threatened abandonment and failure to take reasonable steps to avoid prejudice to his client from such withdrawal amounted to economic duress.

The court in *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154 (*Rich &*

Whillock) – a case relied on by Chan – described the doctrine of economic duress as follows: "The [economic duress] doctrine is equitably based [citation] and represents 'but an expansion by courts of equity of the old common-law doctrine of duress.' [Citation.] As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. [Citations.] Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. [Citations.] The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. [Citations.] Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. [Citations.]" (*Id.* at pp. 1158-1159, fn. omitted.)

A party whose consent to a contract has been obtained by economic duress may rescind the contract under certain circumstances. "A party to a contract may rescind the contract. . . . [¶] (1) If the consent of the party rescinding, . . . was . . . obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. [¶] . . . ." (Civ. Code,

§ 1689, subd. (b).) Thus, a party who enters into a contract under duress may obtain rescission against another contracting party, who, although not responsible for the duress, knows that it has taken place and takes advantage of it by enforcing the contract, particularly a contract made with inadequate consideration. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 206; see also Rest.2d Contracts, § 175, com. e, p. 479.)[17]

Here, assuming arguendo that Chan demonstrated that he signed the Settlement Memorandum under economic duress as a result of his attorney's threatened withdrawal, the attorney was neither a party to the Settlement nor "jointly interested" with any contracting party. (Civ. Code, § 1689, subd. (b)(1).) Further, there is nothing in the record to suggest that defendants in any way connived with Chan's attorney in allegedly exerting such pressure. (*Ibid.*) Indeed, there is no evidence that defendants were even aware of the alleged threat at the time of Chan's execution of the Settlement Memorandum. In short, even assuming the attorney exercised duress upon Chan and that

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[17] "If a party's assent has been induced by the duress of a third person, rather than that of the other party to the contract, the contract is nevertheless voidable by the victim. There is, however, an important exception if the other party has, in good faith and without reason to know of the duress, given value of changed his position materially in reliance on the transaction. 'Value' includes performance or a return promise that is consideration . . . so that the other party is protected if he has made the contract in good faith before learning of the duress. [Citation.]" (Rest.2d Contracts, § 175, com. e, p. 479.)

this duress caused him to sign the Settlement Memorandum,[18] Chan presented no legal grounds for rescission.

In *Bistany v. PNC Bank, NA* (D.Mass. 2008) 585 F.Supp.2d 179 (*Bistany*), the plaintiffs made a similar argument in support of their contention that they should not be bound by their settlement. In *Bistany*, after the plaintiffs had authorized their attorney to propose a settlement of certain bank litigation and a settlement had been confirmed between counsel, the plaintiffs discharged their attorney and repudiated the settlement. (*Id.* at p. 181.) In response to the bank's motion to enforce settlement, the plaintiffs argued that their attorney coerced them into settling by threatening to withdraw from the litigation unless they signed the settlement proposal to the bank. (*Id.* at pp. 183.) The court rejected the plaintiffs' contention that the settlement agreement was voidable because their consent was given under duress, concluding that "such threats do not constitute duress." (*Ibid.*) It reasoned: "Upholding a settlement under such circumstances is warranted because, in general, duress must emanate from the opposing party to an agreement, not one's own attorney, unless the opposing party

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[18] As we observed above (see pt. II.B., *ante*), since Chan had "provisionally" agreed in May to the monetary terms of the ultimate Settlement, and the Settlement did not include a stipulation for injunctive relief that Chan claims was coerced by his attorney, it is debatable whether the attorney's alleged threat to withdraw from the case, if it occurred, was the cause of Chan's execution of the Settlement Memorandum.

knows of the duress. [Citations.] Therefore, this Court finds that the defense of duress is unavailable to the Bistanys." *(Ibid.)*

Chan's reliance on *Rich & Whillock*, *supra*, 157 Cal.App.3d 1154, is misplaced. In that case, the defendant, after encouraging the plaintiff to complete its grading and excavating work and without expressing any disagreement with progress billings, refused to pay the balance when the final billing was submitted. (*Id.* at p. 1156.) After the plaintiff complained that nonpayment would cause it (a new company) financial ruin, the defendant offered a nonnegotiable settlement of approximately two-thirds of the amount due, and the plaintiff reluctantly agreed, stating the proposal "was 'blackmail' and [it] was signing it only because [it] had to in order to survive." (*Id.* at p. 1157.) After the plaintiff signed a release and was paid pursuant to the compromise, the plaintiff sued for the balance owing under the original agreement. The court held that the defendant's conduct constituted a bad faith breach of the agreement, and that the trial court had thus properly concluded that the release was the product of economic duress and did not bar the plaintiff from suing for the balance owed under the original contract. (*Id.* at pp. 1160-1161.)

In the case before us, the defendants were not responsible for any alleged acts of economic duress and were not aware of Chan's allegation that his consent to the Settlement was coerced until after the contract was entered into. The party responsible for the alleged duress, Chan's attorney, was not a party

to the agreement. *Rich & Whillock*, obviously has no application to the circumstances here, and Chan was not entitled to rescind the Settlement under Civil Code section 1689, subdivision (b)(1).

2. *Undue influence*

Chan also asserts that his attorney's offer to discount his fees as an inducement to Chan to settle constituted undue influence because the act violated rule 3-300. He argues further that "[e]ven according to more exacting legal standards for undue influence between persons not in a fiduciary relationship, [Chan's attorney's] tactics amounted to undue influence: . . . " He urges that rescission of the agreement to settle is thus appropriate because his consent was obtained through undue influence.

Rule 3-300 prohibits an attorney from entering into a business transaction with his or her client unless (1) the terms of the transaction are fair and reasonable to the client and are fully disclosed in writing, (2) the client is given written notice of the right to seek the advice of independent counsel and is afforded a reasonable opportunity to do so, and (3) the client consents in writing to the transaction.[19]

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[19] "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: [¶] (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in

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Although the rule does not define "business transaction," the comments to the rule make it clear that the restrictions against business transactions do not encompass retainer agreements between attorney and client: "Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.[20]"

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writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition." (Rule 3-300.)

[20] "(A) A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee. [¶] (B) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. Among the factors to be considered, where appropriate, in determining the conscionability of a fee are the following: [¶] (1) The amount of the fee in proportion to the value of the services performed. [¶] (2) The relative sophistication of the member and the client. [¶] (3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. [¶] (4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member. [¶] (5) The amount involved and the results obtained. [¶] (6) The time limitations imposed by the client or by the circumstances. [¶] (7) The nature and length of the professional relationship with the client. [¶] (8) The experience, reputation, and ability of

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(Rule 3-300, Discussion, ¶ 1.) The rule, however, does apply to an arrangement where the attorney "wishes to obtain an interest in client's property in order to secure the amount of the [attorney's] past due or future fees." (Rule 3-300, Discussion, ¶ 3; cf. *Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1104 [rule 3-300 does not apply to unsecured promissory note executed by client in favor of attorney to memorialize obligation for unpaid fees].)

Here, there was no "business transaction" between the attorney and client that Chan's attorney allegedly sought to enter into. He merely offered to discount the amount of fees he would charge Chan for the litigation and did so (according to Chan) as an inducement to Chan to settle. By discounting his fees, the attorney did not enter into a business transaction with Chan. Nor did he acquire an interest in Chan's property – the fee-discount offer did not involve his obtaining an interest in Chan's third-party claims or in the settlement proceeds from the case.

Chan cites no relevant authority in support of his claim that his attorney's alleged offer to discount fees was a business transaction with a client controlled by rule 3-300. Instead, he relies on the inapposite case of *BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th

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the member or members performing the services. [¶] (9) Whether the fee is fixed or contingent. [¶] (10) The time and labor required. [¶] (11) The informed consent of the client to the fee." (Rule 4-200.)

1217 (*BGJ Associates*). In *BGJ Associates,* the attorney, after filing suit on behalf of his client to enforce a prescriptive easement over property adjacent to his client's, and while the suit was still pending, entered into an oral joint venture agreement with the client to acquire the adjacent property. (*Id.* at pp. 1221-1222.) After the relationship between attorney and client deteriorated and while the easement suit was still pending, the attorney brought suit against the client claiming, inter alia, breach of an oral agreement. (*Id.* at pp. 1222-1224.) The client asserted that the transaction with the attorney was void or voidable because of the absence of compliance with rule 3-300 and was presumptively a breach of fiduciary duty under Probate Code section 16004, and the trial court agreed that the transaction was void as against public policy. (*BGJ Associates*, at p. 1225.) The appellate court agreed that the oral agreement constituted a business transaction between attorney and client and that the attorney did not comply with rule 3-300. (*BGJ Associates*, at pp. 1226-1227.) It held further that a violation of the rule "subjects an attorney to disciplinary proceedings, but does not in itself provide a basis for civil liability. [Citation.]" (*Id.* at p. 1227.) Although the court agreed that the trial court properly held that the oral agreement was unenforceable (*id.* at p. 1231), it reasoned that the agreement was voidable, not void, as a result of undue influence that rendered the attorney's conduct a violation of his fiduciary duties under Probate Code section 16004. (*BGJ Associates,* at p. 1229.) As is obvious from a brief recitation of these facts, *BGJ Associates* is

plainly distinguishable and offers no support for the claim here that the alleged fee-discount offer by Chan's attorney was governed by rule 3-300.[21]

Chan asserts further that, even without regard to the fiduciary role of Chan's attorney, his counsel's "tactics amounted to undue influence" under Civil Code section 1575. That statute provides that undue influence includes "taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575, subd. (3).)[22] Chan argues, citing *Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443 (*Keithley*), that his attorney, by threatening to withdraw on August 3, rescinding the threat on August 4, and then shortly thereafter the same day renewing the threat, subjected Chan to "overpersuasion" that resulted in Chan's execution of the Settlement Memorandum. (*Id.* at p. 452)

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[21] Under a heading in his opening brief separate from his undue influence argument, Chan challenges the Settlement, again on the basis that it was created as a result of his attorney's entering into an invalid business transaction with his client, namely, the discounting of his fees. Since we have concluded in this section that the discounting of fees was not an unauthorized business transaction restricted under rule 3-300, we need not address Chan's separate, but somewhat redundant, argument claiming an invalid business transaction.

[22] "Undue influence consists: [¶] 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; [¶] 2. In taking an unfair advantage of another's weakness of mind; or, [¶] 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575.)

Although *Keithley*, *supra*, 11 Cal.App.3d 443, is distinguishable,[23] and we doubt that Chan presented a sufficient showing of undue influence, we need not decide whether the attorney's actions as alleged in Chan's opposition constituted undue influence. As noted above, rescission may be granted "[i]f the

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[23] In *Keithley*, *supra*, 11 Cal.App.3d 443, an Oakland police officer, Liquori, resigned his position after being told by superiors that an allegation of rape had been asserted within the department, an allegation Liquori denied. (*Id.* at p. 447.) The appellate court concluded that there was substantial evidence to support the conclusion of the Oakland Civil Service Board that the Liquori's resignation had been the product of undue influence, based upon such facts as his having been "called to police headquarters on three successive days, . . . kept waiting for long periods of time, . . . interrogated by a member of the homicide squad, and on the third day . . . ordered to appear before [Deputy Chief] Brown, who, although already advised that the charges had been dropped, proceeded to read the statements regarding the charges and asked Liquori what he was going to do, emphasizing simultaneously that the charges should not be made public and suggesting that Liquori was guilty of unofficer-like conduct. Liquori was not given any time to consider what he wanted to do and was repeatedly asked what he was going to do about the situation. There was also evidence that at the time he signed his resignation Liquori was emotionally upset and that he was physically fatigued because he had not slept for 24 hours. These facts reasonably lend themselves to the inference that excessive pressure was used to persuade Liquori, who was vulnerable to such pressure by Brown, a dominant person, so as to overcome Liquori's will without convincing his judgment." (*Id.* at p. 452.) While Chan emphasizes the attorney's dominant role and the excessive pressure he allegedly placed upon Chan to settle, the circumstances of *Keithley* are readily distinguishable from those presented here. Moreover, we reject Chan's argument that the mediator, Kelly, also exerted improper pressure on Chan to settle; there is nothing in the record supporting this assertion.

consent of the party rescinding, . . . was . . . obtained through . . . undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." (Civ. Code, § 1689, subd. (b)(1).) Regardless of whether any alleged pressure by the attorney to settle constituted undue influence, he was not "jointly interested" in the contract (i.e., the Settlement), and there was no showing that his alleged "overpersuasion" (*Keithley,* at p. 452) of Chan was done "with the connivance" of any of the defendants. Therefore, Chan was not entitled to rescission under Civil Code section 1689 based upon undue influence. (See *Carroll v. Carroll* (1940) 16 Cal.2d 761, 770-771 [fact that wife's execution of note and deed of trust was procured through duress of husband did not justify rescission as against parties who did not participate in or have knowledge of husband's acts]; see also *Bistany*, *supra*, 585 F.Supp.2d at p. 183.)

3. *Fraud*

Chan contends that the attorney's alleged threat to abandon him, coupled with his failure to advise him that court permission was required in order for him to withdraw as counsel in the case, constituted fraud that warranted Chan's rescission of the Settlement. This contention also lacks merit.

Chan cites no cases that hold that an attorney's threatened withdrawal, along with the failure to advise the client that the withdrawal requires court

approval, constitutes fraud.[24] Irrespective of whether the alleged conduct by Chan's attorney constituted fraud, however, Chan presented no basis for rescission. As is the case with his duress- and undue-influence-based rescission claims, his contention that he may rescind the Settlement because of his attorney's alleged fraud fails under Civil Code section 1689, subdivision (b)(1), because defendants did not connive with Chan's attorney concerning the alleged fraud and the attorney was not a person "jointly interested" in the Settlement. (See *New York Life Ins. Co. v. Occidental Petroleum Corp.* (1941) 43 Cal.App.2d 747 [rescission of assignment of life insurance policy not available where alleged misrepresentation not made or authorized by assignee].)

D. *Mediation Confidentiality Barring Testimony of Mediator*

Chan asserts that the trial court erred by denying him the right to present evidence from the mediator by applying the statutory scheme that prohibits a party from introducing in a subsequent proceeding any evidence concerning a prior mediation. He argues at length that under the circumstances, the

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[24] The only case referenced by Chan, *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133, is cited for the unremarkable proposition that the determination of whether to grant an attorney's motion to withdraw from a case is within the trial court's discretion.

application of mediation confidentiality[25] constituted a denial of Chan's right to due process under the federal and state Constitutions.

The record fails to disclose that the court specifically ruled that Chan was precluded from introducing evidence in opposition to the motions on the basis of mediation confidentiality. The order granting the motions makes no mention of a ruling excluding any evidence proffered by Chan. Similarly, neither the order denying Chan's first ex parte application, nor its minute order denying Chan's second ex parte application, contains a ruling excluding evidence. Further, there is nothing appearing in the transcript of the hearing on defendants' motions on the subject of the mediation privilege or suggesting that the court applied that privilege to exclude evidence proffered by Chan. And at the hearing in March 2009 on Chan's second ex parte application,[26] while the transcript reflects a discussion in which Chan's attorney, Tichinin, advised the court of his belief that Kelly, if subpoenaed, would support Chan's claim that his

---

[25] "Practitioners and the courts sometimes refer to the confidentiality afforded by statute to communications made in connection with mediation as a 'mediation privilege.' [Citations.] Since the Evidence Code does not use the term 'privilege,' we will use 'mediation confidentiality' in our discussion of the statutory provisions rendering communications made in connection with mediation confidential." (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1572, fn. 5.)

[26] There is no reporter's transcript from the hearing on Chan's first ex parte application that occurred in December 2008.

attorney threatened at the mediation to withdraw if Chan refused to settle, the court did not exclude any evidence proffered by Chan or otherwise rule that mediation confidentiality barred evidence that Chan offered to introduce.[27]

In short, because there is no specific order or ruling in which the court held that Chan was barred from introducing evidence to oppose enforcement of the settlement, we need not address Chan's constitutional argument. The argument is based upon a theoretical issue: if Chan had made a specific offer of proof, and if the court had rejected that proffer on the basis that such evidence was barred by mediation confidentiality, such a ruling would have deprived Chan of his right to due process. (See *In re Jody R.* (1990) 218 Cal.App.3d 1615, 1621-1622 [appellate court generally does not decide academic or moot issues].)

---

[27] Chan's offer of proof concerning testimony by the mediator, Kelly, consisted of Tichinin's advising the court that he believed that Kelly would corroborate Chan's declaration to the effect that during the mediation, (1) Chan initially told Kelly that he was appearing at the mediation to find out if his attorney was going to represent him at trial, (2) Chan advised Kelly that he would only approve the stipulation for injunction as it was proposed in May 2008, and (3) his attorney then told Chan that he was not negotiating and that the attorney would not represent Chan at trial. In neither the second ex parte application nor in Tichinin's oral argument did he indicate the basis for his belief that Kelly would corroborate his client's version of the events at the mediation. Rather, it appears that Tichinin's offer of proof – consisting of merely a duplication of a portion of Chan's declaration – appears to be more an offer of hope (i.e. a recitation of the testimony Tichinin hoped Kelly would give) than an offer of proof.

DISPOSITION

The judgment on the order granting the motions to enforce settlement pursuant to Code of Civil Procedure section 664.6 is affirmed.

Duffy, J.

WE CONCUR:

Rushing, P.J.

Premo, J.

Trial Court:

Santa Clara County Superior Court
No. CV072392

Trial Judge:

Hon. Neal A. Cabrinha

Attorneys for Plaintiff and Appellant:

Bruce Tichinin
Law Offices of Bruce Tichinin

Attorneys for Defendants and Respondents:

Lund:

Salvatore J. Sunseri
Stenberg, Sunseri, Roe, Pickard & Rudy

Norma Tree Srvc. & Norma Gonzalez

Kenneth D. Simoncini
Kerri A. Johnson Simoncini & Assc.

Chan v. Lund et al.
No. H034196

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BILL CHAN, Plaintiff and Appellant, v. CRAIG T. LUND et al., Defendants and Respondents.	H034196 (Santa Clara County Super.Ct.No. CV072392) ORDER MODIFYING OPINION NO CHANGE IN THE JUDGMENT PETITION FOR REHEARING DENIED (Filed Oct. 28, 2010)

THE COURT:

It is hereby ordered that the opinion filed September 29, 2010, be modified as follows:

On page 8 at the end of the first full paragraph after "Conduct," add the following footnote number 7 (with the remaining footnotes renumbered accordingly):

> Chan filed a petition for rehearing, arguing, inter alia, that, evidence of coercive statements allegedly made at the mediation was inadmissible under Evidence Code section 1119, subdivision (a). No party asserted an objection below, nor did Chan challenge this

evidence (from his own declaration) in his briefs on appeal. We need not consider Chan's argument or his belated evidentiary objection. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092.) Without this evidence, Chan's factual showing in opposition to enforcement of the Settlement would evaporate; the result in this case would therefore be the same had we not considered it. Accordingly, in addressing Chan's claims, *post*, we will assume, arguendo, that Chan's evidence is not inadmissible.

There is no change in the judgment.

The petition for rehearing is denied.

Dated: /s/ _____
Duffy, J.

/s/ _____
Rushing, P.J.

/s/ _____
Premo, J.

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KATHLEEN MARIE LUND and
CRAIG T. LUND, Individually and as
Co-Trustees of LUND FAMILY TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA –
UNLIMITED JURISDICTION

BILL CHAN, Plaintiff, vs. KATHLEEN MARIE LUND and CRAIG T. LUND, Individually and as Co-Trustee of LUND FAMILY TRUST and DOES 1-20, Defendants. /	NO: 1-06-CV072392 **ORDER GRANTING DEFENDANTS' MOTION TO ENFORCE AND ENTER JUDGMENT ON MONETARY SETTLEMENT** (Filed Mar. 11, 2009)

The motions of Defendants, cross-complainants and cross-defendants Kathleen Marie Lund and Craig T. Lund, individually and as Co-trustees of Lund Family Trust, Norma Tree Service and Norma

Gonzales to enforce a settlement agreement pursuant to California Code of Civil Procedure Section 664.6 came on regularly for hearing on November 13, 2008 before the Honorable Neil Cabrinha, Judge of Superior Court. Salvatore J. Sunseri appeared on behalf of Defendants Lund. Marie Ballon of Simoncini and Associates appeared on behalf of Defendants Norma Tree Service and Norma Gonzales. Bruce Tichinin appeared on behalf of Plaintiff Bill Chan. Oral argument having been presented and considered, and for good cause shown, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the motion of Defendants Kathleen Marie Lund and Craig T. Lund, individually and as Co-Trustees of Lund Family Trust, Norma Tree Service, and Norma Gonzales to enforce the August 4, 2008 settlement agreement in the amount of $36,100.00 is granted, with said sum to be paid as follows:

> State Farm Insurance Company to pay $11,100.00 on behalf of the Lund Defendants, and $25,000.00 to be paid by Colony Insurance Company on behalf of Norma Tree Service and Norma Gonzales;

2. The motion of Defendants Lund to enforce that portion of the August 4, 2008 settlement agreement with regard to stipulated injunctive orders between Bill Chan and the Lund Defendants is denied;

3. Each party shall bear its own costs and attorneys' fees;

4. Any and all cross-complaints between Kathleen Lund and Craig T. Lund, individually and as Co-Trustees of the Lund Family Trust and Norma Tree Service and Norma Gonzales are ordered dismissed with prejudice;

5. Upon the filing of the within order, Plaintiff's First Amended Complaint on file herein is ordered dismissed with prejudice;

6. The within order may be reviewed and approved as to form in counterparts by the attorneys of record for the respective parties.

Dated: 3/11/09 /s/ Neil Cabrinha
Hon. Neil Cabrinha
Judge of Superior Court

Reviewed and approved as to form:

Dated: _____ /s/ _____
Bruce Tichinin, Esq.
Attorney for Plaintiff
BILL CHAN

Dated: 2/27/09 /s/ Salvatore J. Sunseri
Salvatore J. Sunseri, Esq.
Attorney for Defendants/
Cross-complainants
KATHLEEN MARIE
LUND and CRAIG T.
LUND, Individually and
as Co-Trustees of LUND
FAMILY TRUST

Dated: 2/18/09 /s/ Kevin A. John for
Kenneth Simoncini, Esq.
Attorney for NORMA
TREE SERVICE AND
NORMA GONZALEZ

Reviewed and approved as ~~to form:~~ [B.T. conforming to the order of the Court.]

Dated: January 14, 2008 /s/ Bruce Tichinin
Bruce Tichinin, Esq.
Attorney for Plaintiff
BILL CHAN

Dated: _____ /s/ _____
Salvatore J. Sunseri, Esq.
Attorney for Defendants/
Cross-complainants
KATHLEEN MARIE
LUND and CRAIG T.
LUND, Individually and
as Co-Trustees of LUND
FAMILY TRUST

Dated: _____ /s/ _____
Kenneth Simoncini, Esq.
Attorn y for NORMA
TREE SERVICE AND
NORMA GONZALEZ

Court of Appeal, Sixth Appellate District –
No. H034196

S187992

IN THE SUPREME COURT OF CALIFORNIA

En Banc

BILL CHAN, Plaintiff and Appellant,

v.

CRAIG T. LUND et al., Defendants and Respondents.

(Filed Jan. 12, 2011)

The petition for review is denied.

/s/ CANTIL-SAKAUYE
Chief Justice

CONFIRMATION OF SETTLEMENT AS A RESULT OF MEDIATION

Mediator: Kevin G. Kelly, Esq. Date: 8/4/08

Case Name: Bill Chan v. Lund, et al.

Incident Date: _____

Court: Santa Clara County Superior Court

Case No. 1-06-CV072392

All undersigned participants in the mediation of this case having agreed that the course of the mediation has ended, the undersigned plaintiff, and the defendants, in the above captioned case, agree that they have reached a full and final settlement of all of the claims of said plaintiff in said case. The terms of the settlement are as follows:

In addition to any sums already paid, the sum of $36,100.^{00}/_{100}$ shall be paid by (carrier) State Farm (11,100.); Colony (25,000.) for (defendant) Kathleen Lund, Craig T. Lund, individually and as Co-Trustee the Lund Family Trust Norma Tree Service Norma Gonzalez, and Jose Contreras to (plaintiff) Bill Chan who accepts said sum as full settlement of all claims, both known and unknown, of said plaintiff in this case.

Said plaintiff is responsible for payment of all of said plaintiff's attorney's fees ~~and all of said plaintiff's medical liens and bills (except to the extent already paid by the defendant's carrier), and said plaintiff and plaintiff's attorney agree to hold each defendant~~

~~and defendant's carrier harmless for the same~~. Said plaintiff waives the provisions of Civil Code §1542 which says: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the tie [sic] of executing the release, which if known by him must have materially affected his settlement with the debtor." Each side shall bear their own costs unless otherwise noted on this document.

[This is a global settlement and includes dismissals of all cross-complaint.]

Defendant's representative will prepare a release of all claims form and a request for dismissal with prejudice form of plaintiff's entire action in the above captioned case and will forward those documents to said plaintiff's attorney. Payment will be made within 30 days ~~weeks~~ of receipt by the representative of defendant's carrier of said fully executed release and dismissal forms.

[The monetary settlement reached in this case is not conditioned or contingent on the parties Lund et al. or Chan reaching or entering into an [sic] stipulated injunction order.]

The undersigned parties and their representatives agree that this settlement agreement is intended to be a binding settlement agreement and comply with CCP §664.6 and is exempt from the confidentiality agreements applicable to the mediation of the above captioned case.

[Plaintiff and Defendants Lund anticipate executing a stipulated injunctive order per proposed 5/7/08 stipulation modified to provide that this Agreement is independent and not contingent on any agreement re injunction between plaintiff and Lunds. Plaintiff will remove trees 1 & 2 within 45 days if permit issued and funds paid. Trees 3-12 to be replaced in one year from arborist list selected by Bill Chan. (See attached [illegible])]

/s/ _____	/s/ _____
Plaintiff	Defendant's Insurance Carrier
/s/ Bill S. Chan 08/04/2008	/s/ Sal J. Sunseri for Lunds 8/4/08
/s/ David R. Packard 8/4/08 4:00pm	/s/ Kenneth Simoncini for D. Norma Tree et al. 8/4/08
Attorney for Plaintiff	Attorney for Defendant

[See Attachment Page]

BSC DRP SJS

[Attachment Page

Chan v. Lund
Mediated Settlement

Arborist Barrie Coate and Ray Morneau have prepared list of tree/shrubs, to function as a dense, every green [sic] hedge, preferably not to exceed 25 feet in heighth and not to exceed 35' (maximum) heighth, to be selected by Bill Chan. Arborist will recommend location of trees/shrubs in relation to the

fence between Lunds/Chan properties. Plaintiff will not replant trees/shrubs within ten foot front setback measured from street pavement, provided that plaintiff may plant plants not to exceed six feet high in the setback area.

Plaintiff and Defendants' Lund general release of claims shall not apply, as between said parties only, as to any injunctive claims in the event that they can not agree on and execute a Stipulation For Injunctive Orders.

Each party will pay his/her respective attorney fees and costs.]

/s/ Bill S. Chan 08/04/2008	/s/ Sal J. Sunseri for Lunds 8/4/08
/s/ David R. Packard 8/4/08 4:00pm Atty for Bill Chan	/s/

188 (2)

No. 10-1256

In the
Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

BRIEF IN OPPOSITION

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Counsel for Respondents
Kathleen M. Lund and Craig T. Lund

May 16, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890 5001

QUESTION PRESENTED

Are constitutionally protected due process rights violated by the California Mediation Confidentiality Law, Cal. Evid. Code §§ 1119, 1123, when enforcing a settlement agreement against a participating party even though there is no judicial or other state action taken involving the statutes in question?

CORPORATE DISCLOSURE STATEMENT

Kathleen M. Lund and Craig T. Lund; individually and as Co-Trustees of the Lund Family Trust are not a subsidiary or affiliates of a publically owned company.

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SUMMARY OF REASONS TO DENY THE PETITION

The Brief in Opposition to the Petition for a Writ of Certiorari to be submitted by Co-Respondent, Norma Tree Service has been carefully reviewed and Co-Respondents Craig and Kathleen Lund adamantly agree with the substance and analysis of these legal matters as presented therein. Providing a separate brief on the same issues and arguments would only abrogate judicial economy. Therefore, Respondents Craig and Kathleen Lund adopt and incorporate by reference the entire brief in opposition submitted by Co-Respondents Norma Tree Service and Norma Gonzales.

PETITIONER HAS MISREPRESENTED THE FACTS OF THIS MATTER

While Co-Respondents, Craig and Kathleen Lund rely upon the sound logic and legal arguments presented in Co-Respondents Norma Tree Service's Brief in Opposition, Co-Respondents Craig and Kathleen Lund are required to address the warning contained in Supreme Court Rule 15.2. Said rule provides that if any perceived misstatements of fact or law in the Petition are not addressed, they may later be deemed to have been waived. Co-Respondent Lund believes that the court analysis should never get to these issues based upon the reasoning and legal analysis presented in Co-Respondent Norma Tree Service's Brief in Opposition. But, in an abundance of caution, these perceived misrepresentations must be identified.

A. Lack of Warning

Petitioner has created for the first time an argument that somehow there were inadequate warnings as to the potential outcomes when Petitioner chose to mediate rather than elect any of the other available services such as a judicial settlement conference. The inference presented by Petitioner is that there were no warnings actually articulated to Petitioner as to the consequence of triggering the California Confidentiality Statutes when voluntarily choosing mediation. Based upon this being the first time this particular issue is raised by Petitioner and based upon its misrepresentation, Co-Respondent Lund submits the attached Declaration of Craig Lund and the authenticated "Acknowledgment Regarding California Evidence Code" signed by all parties including Petitioner Chan on October 30, 2007. The date that this document was signed was the first mediation session involving Mediator Kelly. The final settlement document was executed on August 4, 2008, which was the fifth mediation session held with Mediator Kelly in this matter. Resp. App. at 1b; Pet. at 4.

B. Lack of Waiver

Another issue manufactured by Petitioner for the first time in his Petition is the allegation that there could not have been a waiver of Chan's due process rights as they pertain to the potential, but not actual, impact of the California Confidentiality Statutes. Pet. at 21. Petitioner further argues that the "Court will not presume acquiesces in the loss of a fundamental constitutional right." Pet. at 22. Again, this is an attempt to misrepresent the facts of this case when

there was actually a signed Acknowledgment which specifically addresses the application of the California Confidentiality Statutes and Petitioner fails to disclose in his brief. App. at 1b.

CONCLUSION

With brevity, and lack of redundancy still at a premium, Petitioner has failed on numerous grounds to establish any legitimate reason for his Petition to be granted by this Court. It is the respectful request by all Respondents that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Counsel for Respondents Kathleen M. Lund and Craig T. Lund

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APPENDIX A

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 10-1256

[Dated May 9, 2011]

BILL CHAN,	)
	)
Petitioner,	)
	)
vs.	)
	)
KATHLEEN MARIE LUND and CRAIG T. LUND, Individually and as Co-Trustee of LUND FAMILY TRUST and DOES 1-20,	)
	)
Respondent.	)
	)

DECLARATION OF CRAIG T. LUND

I, CRAIG T. LUND hereby declare:

1. I am an adult over eighteen years of age, reside in the State of California, have personal knowledge of the things and matters hereinafter set forth, and if called as a witness can testify competently thereto.

2. I was a named defendant in the Santa Clara County Superior Court Case No. 1-06-CV-072392.

3. As part of the voluntary mediation in the matter (1-06-CV-07239, I and my wife, co-defendant, Kathleen Lund signed an "Acknowledgment Regarding California Evidence Code" on October 30, 2007. A true and correct copy of that document is attached as Exhibit A to this declaration.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 9th day of May, 2011 at San Jose, California.

CRAIG T. LUND

ACKNOWLEDGEMENT REGARDING CALIFORNIA EVIDENCE CODE

In the Matter of Mediation between

Re: Chan v. Lund

In order to promote communication among the parties and the mediator and to facilitate resolution of the dispute, all undersigned participants agree as follows:

1. This mediation process is to be considered settlement negotiations for the purpose of all state and federal rules protecting disclosures made during such process from later discovery and/or use in evidence.

2. The provisions of California Evidence Code Sections 1115 through 1128 and 703.5, apply to this mediation. The substance of the significant portions of these sections is described below. This agreement extends to all present and future civil, judicial, quasi-judicial, arbitral, administrative or other non-criminal proceedings.

3. The privileged character of any information or documents is not altered by disclosure to the mediator. The mediator's subsequent oral and written communications with the mediation participants in a continuing effort to resolve the dispute are also protected by this Agreement. In the event the mediation does not fully resolve the dispute in the initial session, the participants agree that the confidentiality provisions of Sections 1115 through 1128 and of this Agreement continue in full force and

effect past the 10 calendar day period set forth in Evidence Code Section 1125(a) (5), unless the mediation is terminated through any of the mechanisms set forth in section 1125 (a) (3) and (4) or (b) (1) and (2).

4. This Agreement and any written settlement agreement resulting from the mediation are admissible to prove the existence of and/or to enforce the settlement agreement under California Code of Civil Procedure Section 664.6, if applicable, or under any procedure permitted by law.

5. Because the participants are disclosing information in reliance upon this Agreement, any breach of this Agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any party to this Agreement may obtain an injunction to prevent disclosure of any such privileged information in violation of this Agreement.

6. THE PARTICIPANTS UNDERSTAND THAT THE MEDIATOR IS SERVING AS A NEUTRAL INTERMEDIARY AND FACILITATOR OF SETTLEMENT ONLY AND THAT HE OR SHE IS PROHIBITED FROM ACTING AS AN ADVOCATE OR ATTORNEY FOR EITHER PARTY. THE MEDIATOR'S STATEMENTS DO NOT CONSTITUTE LEGAL ADVICE TO ANY PARTY, AND EACH PARTY IS ENCOURAGED TO SEEK LEGAL ADVICE FROM COUNSEL. IN

THE EVENT THAT THE MEDIATOR ASSISTS IN THE PREPARATION OF A SETTLEMENT AGREEMENT, EACH PARTICIPANT IS ADVISED TO HAVE THE AGREEMENT INDEPENDENTLY REVIEWED BY COUNSEL PRIOR TO EXECUTING THE AGREEMENT.

David R. Rickard Atty (Name and Title)	David R. Rickard 10/30/07 (Signature and Date)
BILL CHAN (Name and Title)	Bill Chan 10/30/07 (Signature and Date)
RAY MORNEAU, ARBORIST (Name and Title)	Ray Morneau 10/31/2007 (Signature and Date)
Kathleen Lund (Name and Title)	Kathleen Lund (Signature and Date)
CHRIS LUND (Name and Title)	10/30/07 (Signature and Date)
Sal Suasci, Atty (Name and Title)	10/30/07 (Signature and Date)
Kenneth D. Simonini (Name and Title)	10-30-07 (Signature and Date)
Kevin G. Kelly (Name and Title)	Kevin G. Kelly 10/30/07 (Signature and Date)

(NCP/arw)

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No. 10-1256

In the Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District

BRIEF IN OPPOSITION

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Counsel for Respondent Norma Tree Service

May 16, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Does California's mediation confidentiality law, California Evidence Code §§ 1119, 1123, violate the due process rights of a knowing participant to a valid, enforceable settlement agreement, even if the participant was never precluded from presenting evidence from the mediation, in support of his claim to set aside the settlement?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE PURSUANT TO RULE 29.6.

Norma Tree Service is a privately held entity and is not a subsidiary or affiliate of a publicly owned company. No parent or publicly owned company owns 10% or more of the membership interests of Norma Tree Service.

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SUMMARY OF REASONS TO DENY THE PETITION

Petitioner Bill Chan "Petitioner" has not established proper grounds to grant review by certiorari. First, Petitioner does not have standing to argue this action as he has not been injured by the statutes in question. Specifically, there was no order or ruling that prevented Petitioner from presenting evidence from the mediation. Such evidence, which includes the mediator's proposed testimony, was, in fact, considered by the court and is reflected on the record. Petitioner has thus posed a question for review not borne out of the facts and is effectively seeking an advisory opinion, based on a hypothetical factual scenario.

Second, Petitioner misrepresents the facts and record of this matter. Third, this case does not present an important question of law and does not have any far reaching implication for outside litigants. Moreover, Petitioner attempts to manufacture a conflict of law, where no such conflict exists. Finally, the ruling from the California Court of Appeals was correct and should not be reviewed.

STATEMENT OF CASE

The instant action stems from a complaint filed on October 05, 2006, in Santa Clara County Superior Court, State of California, by Petitioner against Respondents Craig T. Lund and Kathleen Marie Lund and Norma Tree Service. Petitioner alleged Respondents wrongfully trimmed several cypress trees, which purportedly had branches that extended from Petitioner's property.

On August 04, 2008, the parties attended a private mediation to resolve the matter short of trial, before Mediator Kevin Kelly "Mediator Kelly". Petitioner was represented by David Packard "Packard". The parties were able to reach a settlement agreement, which was reduced to writing at the mediation and signed by all parties. Pet. App. 44-47[1]. The writing included many specific terms, agreed upon by the parties and known to Petitioner. Once the settlement was reached, Mediator Kelly explained each and every aspect of the settlement to the parties, including Petitioner, before the agreement was executed. This included an explanation of California law with respect to mediation confidentiality. Up to and including the time the settlement was entered into, Petitioner proffered no evidence regarding coercion or extortion by Packard or that he was an unwitting party to the settlement. Resp. App[2] at 1b-8b.

Thereafter, the parties proceeded to effectuate the settlement. On August 05, 2008, Petitioner sent a letter, attaching his W-9 form, in connection with the issuance of the settlement draft. Petitioner made no mention of any irregularities in the settlement proceedings. Resp. App. at 9b-14b.

On August 12, 2008, Packard stated that he and Petitioner reviewed the settlement agreement and, aside from one reservation regarding injunctive relief, found the document satisfactory. Again, neither

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[1] Pet. App. refers to the Appendix attached to Petitioner's Petition for Writ of Certiorari.

[2] Resp. App. refers to the Appendix to this Opposition filed by Respondent Norma Tree Service.

Packard nor Petitioner expressed any concern about the validity of the settlement.

Suffering from apparent "buyer's remorse", on September 19, 2008, Respondent received a letter indicating that Petitioner had substituted in new counsel, Bruce Tichinin "Tichinin", who submitted a declaration to the Court, requesting the Court not dismiss the suit as the settlement had not been freely obtained. Tichinin indicated, for the first time, that Packard committed fraud by threatening to abandon Petitioner at trial, if he failed to attend the mediation.

On November 13, 2008, following hearing and argument, the trial court granted the motion to enforce the settlement, pursuant to California Code of Civil Procedure § 664.6. The court noted there was no evidence to corroborate Petitioner's allegations that Packard coerced him into settling; no evidence to indicate Respondents knew of any such improper or unfair dealings between Petitioner and Packard. Pet. App. at 39-42.

On November 25, 2008, Petitioner filed an ex parte application asking the court to reconsider its ruling on the motion to enforce the settlement. He asserted there was additional evidence, including a letter from Petitioner to Packard, wherein Packard indicated that he would reduce his fees by $10,000.00. It is uncertain how this furthered Petitioner's position.

On December 11, 2008, Petitioner submitted a supplement to his ex parte application, wherein he argued that if Mediator Kelly were allowed to testify, he could corroborate certain statements made by

Packard, which would support Petitioner's claims of coercion, fraud, duress etc.

On December 22, 2008, the trial court issued an order denying Plaintiff's Ex Parte Application, stating that Plaintiff did not file a motion for reconsideration under California Code of Civil Procedure § 1008. The Court stated reconsideration was not warranted. The record was augmented to include the letter from Packard, regarding a reduction of fees. The court did not apply the mediation statutes in reaching its holding.

On March 11, 2009, Petitioner filed a second ex parte application to set aside the settlement, including an offer of proof. The offer of proof delineated what Mediator Kelly would testify to, if allowed, and how it would support the motion to set aside the settlement. The Court considered the proposed testimony of Kevin Kelly and still found no reason to disturb the settlement agreement.

The court responded to the offer of proof regarding the proposed testimony from Mediator Kelly and held:

> **THE COURT:** *Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim.* I don't think in the law the defendants lose their deal. They've got a deal with the plaintiff. This is a case for money...I see no reason since then to rethink this, to reconsider it, whether on plaintiff's motion or on the Court' own motion, so I'm going to deny the ex parte application...Resp. App. 18b-21b.

The trial court, signed the order to enforce the settlement.

Petitioner appealed to the California Court of Appeals. In *Chan v. Lund,* 188 Cal.App.4th 1159 (2010), the California Court of Appeals ruled on the following issues presented by Petitioner: (1) the settlement is void due to fraud and contravenes public policy, (2) Petitioner is entitled to rescind the settlement agreement under theories of economic duress, undue influence, and fraud and, (3) Evidence Code provisions concerning the confidentiality of communication during mediation deprived Petitioner of due process.

Of particular relevance to the instant petition, the California Court of Appeals found Petitioner's due process argument without merit. The Court noted, in its opinion that:

> "The record fails to disclose that the court specifically ruled that Petitioner was precluded from introducing evidence in opposition to the motions on the basis of mediation confidentiality. The order granting the motions makes no mention of a ruling excluding any evidence proffered by Petitioner. Similarly neither the Order denying Petitioner's first ex parte application, nor its minute order denying Petitioner's second ex parte application contain a ruling excluding evidence." *Lund* at 1180. Pet. App. 33-35.

The Court found Petitioner's argument to be theoretical insofar as he was asking the Court that if he made a particular offer of proof and it was denied,

would that constitute a violation of due process. *In re Jody R.* 218 Cal.App.3d 1615, 1621-22 (1990) [appellate court generally does not address academic or moot issues]

The California Supreme Court denied review without opinion, on January 12, 2011 (Case S187992). Pet. App. 43. Thereafter, the instant petition was filed.

REASONS FOR DENYING THE PETITION

Review of this matter is not justified and lacks any factual or legal basis.

United States Supreme Court Rule 10 states that: "Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons". Accordingly, the Supreme Court only grants certiorari in a limited number of cases. As stated in *Magnum Import Co. v. Cory,* 262 U.S. 159, 163 (1923):

> The jurisdiction to bring up cases by certiorari from the Circuit Courts of appeals was given for two purposes, first to secure uniformity of decision between those courts in the [then] nine circuits and second to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

The following, from United States Supreme Court Rule 10, although neither controlling nor fully measuring

the Court's discretion, indicate the character of the reasons the Court considers:

> *(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;*
>
> *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;*
>
> *(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

A. PETITIONER DID NOT SUFFER AN INJURY IN FACT, AS HE WAS NOT PRECLUDED FROM PRESENTING EVIDENCE FROM THE MEDIATION AND THEREFORE LACKS STANDING.

Article III, § 2, of the Constitution restricts the federal "Judicial Power" to the resolution of "Cases" and "Controversies." That case-or-controversy

requirement is satisfied only where a plaintiff has standing. *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332 (2006).

In order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (*i.e.*, a "concrete and particularized" invasion of a "legally protected interest"); (2) causation (*i.e.*, a "'fairly . . . trace[able]'" connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is "'likely'" and not "merely 'speculative'" that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (calling these the "irreducible constitutional minimum" requirements).

Here, Petitioner has not been harmed and therefore, lacks standing. Petitioner was never precluded from presenting evidence from the mediation to support his claim. The California mediation statutes, which Petitioner alleges violate due process, were never even applied by the trial court.

The record in this matter is clear. On November 13, 2008, Respondent moved to enforce the settlement agreement entered into on August 04, 2008. This was the first time Petitioner tendered that he was an involuntary participant to the mediation.

In Petitioner's lengthy opposition to the motion to enforce the settlement, he presented numerous statements made by Packard. This is evidenced in the following excerpts from the Opposition to the Motion to Enforce Settlement, with respect to an alleged

conversation between Petitioner and his former counsel regarding the mediation:

> MR. PETITIONER immediately stated words to the effect of: "*If this is mandatory, I'll go. If not, I won't.* MR. PACKARD responded with words to the effect of: "*If you don't go, it will hurt your case.*" In response, MR. PACKARD said nothing, but merely laughed and walked away. Resp. App. 25b-26b.

The only authentication for the statement and conduct of Packard was a self-serving declaration submitted by Petitioner. The statements, as was pervasive throughout Petitioner's declaration, were riddled with hearsay. Despite the evidentiary issues, Petitioner was allowed every opportunity to present such evidence. The Court did not indicate, anywhere in the record, that these statements were not considered and/or precluded.

On November 25, 2008, Petitioner filed an ex parte application with the court to reconsider and set aside the order enforcing the settlement. The Court denied the Application, but not based on any evidentiary preclusion; rather, the court denied the application on procedural and substantive grounds holding Petitioner did not properly present a motion for reconsideration under California Code of Civil Procedure section 1008. The Court further expressly stated that the record had been augmented to include evidence of Packard's reduction of fees. No evidentiary ruling was issued.

In another attempt to nullify the valid settlement agreement, Plaintiff filed a second ex parte application. The Court considered the proposed

testimony of Mediator Kelly and still found no reason to disturb the ruling on the Motion to Enforce Settlement.

Absent from the record is any application of either California Evidence Code §§ 1119 and 1123. To the contrary, the record reflects that the court took into account the testimony of Kelly, at face value, when rendering its decision stating "*Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim...*" Resp. App. 18b-21b. The trial court found the argument to be unpersuasive.

Fatal assumptions pervade the instant Petition. Specifically, Petitioner was not precluded from presenting evidence from the mediation; the court never applied California Evidence Code §§ 1119 and/or 1123 to preclude evidence from the mediation; and, the court did not enforce the settlement based on the admission and/or preclusion of evidence from the mediation.

Accordingly, this Court does not get to the question of whether Petitioner was denied due process, because the facts giving rise to such assertions are lacking. Petitioner's posturing as to what would have or could have resulted, under various factual scenarios, is insufficient basis to grant review on a petition for certiorari by this Court.

This Petition is effectively a request for an advisory opinion, which should be interpreted as: "If Petitioner had been precluded from presenting evidence from the mediation, would such preclusion constitute a due process violation?" This Court does not issue advisory

opinions, except in very limited circumstances. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)[3].

B. PETITIONER MISREPRESENTS THE RECORD AND FACTS OF THIS MATTER.

This Court has emphasized that certiorari is not appropriate when the constitutional question proposed by the petitioner is not fairly presented by the record, *Rogers v. United States*, 522 U.S. 252, 253 (1998), "is not presented with sufficient clarity," *Mclanahan v. Morauer & Hatzell*, 404 U.S. 16 (1971); or when "the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petition for certiorari. *Boldonado v. California*, 366 U.S. 417 (1961).

The record here is clearly misrepresented by Petitioner. There is no evidence that Petitioner was precluded from proffering evidence from the mediation in support of his claim to set aside the mediation. Petitioner has not fairly and accurately presented this matter and, on that basis alone, review can and should be denied.

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[3] By refraining from deciding cases that rest on an adequate and independent state ground, federal courts show proper respect for state courts and avoid rendering advisory opinions. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983)

C. THIS PETITION DOES NOT PRESENT AN IMPORTANT QUESTION OF LAW.

Rule 10 admonishes the petitioning party that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of properly stated rule of law."

Here, the question posed to the court does not meet the requisites for review. First, Petitioner was not precluded from presenting evidence from the mediation on account of California's "strict" mediation confidentiality statutes. Any review of this hypothetical and factually unique scenario would be an exercise for scholarly or academic pursuits.

As this Court so clearly stated, a federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. *Magnun Import Co. at 163.*

Petitioner is veiling a question of fact, whether he was extorted by his attorney, as a question of law, review of which is imprudent. *NLRB v. Hendricks City. Rural Electric Corp.*, 454 U.S. 170, 176 (1981) citing *Rudolph v. United States,* 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Second, review of this hypothetical question would have no benefit to any individuals other than those directly involved in the subject action. This Court has held that certiorari is inappropriate when the dispute

involves, not a question of law, but rather a factual matter that is "of no importance save to the litigants themselves." *Rudolph* at 270.

To be sure, counsel has cited no cases in which this unique factual issue has ever been presented i.e. a litigant seeks to revoke his acquiescence to a settlement, and is prevented from doing so based on mediation confidentiality. Again, that hypothetical scenario would not even apply to this case, as the court did not issue an evidentiary preclusion order.

To reach the hypothetical question posed by Petitioner, this Court would have to manifestly disregard the record of this matter. This Court would first have to overlook that the record does not reflect that Petitioner was ever precluded from presenting evidence. This Court would have to disregard that the trial court considered Mediator Kelly's proposed testimony. This Court would also have to dismiss that the trial court did not base its ruling to enforce the settlement on any evidentiary grounds. Upon closer examination, this purported question of law is ultimately one of fact and would thus serve no benefit "save to the litigants themselves." *Rudolph* at 270.

Finally, Petitioner attempts to manufacture a conflict of law between California Evidence Code §§ 1119, 1123, and holdings of this Court, where no such conflict exists.

Petitioner cites to this Court's holding in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), a case which is clearly distinct from the matter at hand. In *Mullane*, a trust company in New York, which had exclusive management and control of a common trust

fund, petitioned for a judicial settlement of accounts. The trust company sent notice of the petition solely by publication in a local newspaper. This Court addressed whether the State had an interest and right to provide means to close the trusts; whether the notice by publication was sufficient; and, whether such means would deprive due process to those known and unknown persons of interest. *Id.*

Petitioner fails to properly frame how or why the California statutes, allegedly at issue, conflict with the holding in *Mullane*. Here, Petitioner is alleging that his due process rights were cut off by a "statutory scheme" stemming from California evidentiary law concerning the mediation privilege. In *Mullane*, this Court addressed whether due process rights were abrogated by a publication notice. The only similarity between the two cases is that there are allegations of due process violations, an argument which is virtually ubiquitous in writs for certiorari.

This case does not involve a "statutory scheme"; rather, valid evidentiary statutes, none of which are at issue given the underlying record. Second, this case does not involve notice by publication to known and unknown persons of interest. Finally, there are no jurisdictional issues at play here. Thus, there is no basis to find any conflict between the California evidentiary statutes and/or the California Court of Appeal ruling in *Lund v. Chan* and the holding and *Mullane*.

Further, Petitioner alleges, without merit, that the California mediation statutes at issue conflict with the holding from *Hall v. Mattel* (2008) 552 U.S. 576. In *Hall*, this Court addressed whether a party could

supplement grounds to vacate and/or modify an arbitration award, established under the Federal Arbitration Act ("FAA"), by contract. This Court held that the FAA's ground for prompt vacatur and modification of awards are exclusive.

Here, there is no conflict with *Hall*. This case neither involves an arbitration award and/or an arbitration contract provision that affects the scope of judicial review. It is uncertain how judicial review of a settlement agreement, entered into pursuant to mediation, would violate the FAA, which governs arbitrations.

Finally, Petitioner cites Texas and Virginia statutes that differ from the California statutes at issue. Conflicting statutes amongst states is not a valid basis for review on certiorari. United States Supreme Court Rule 10 (b)[4]. It appears as if Petitioner advocates some sort of change in legislation, for which this is an inappropriate avenue.

D. THE CALIFORNIA COURT OF APPEALS' RULING WAS PROPER.

The California Court of Appeals made a proper ruling in holding that the trial court did not err in enforcing the settlement. Petitioner alleged that Packard extorted him for his causes of action, purportedly constituting stolen property. The Court of

---

[4] United States Supreme Court Rule 10 (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Appeals properly found that the causes of action were not surrendered to Packard, and thus, a claim for extortion against Packard could not prevail.

Petitioner alleged that he was entitled to rescind the settlement agreement under theories of economic duress, undue influence and fraud, perpetrated by Packard. The Court of Appeals properly found that Packard was not a "jointly interested" party to the settlement, and thus, the aforesaid grounds for rescission fail.

Finally, the Court of Appeals held, as is contended herein by Respondent, that Petitioner was not denied due process, by virtue of the California mediation statutes, because the record clearly showed Petitioner was never precluded from presenting any evidence from the mediation. In fact, the trial court, in ruling on the second ex parte application, considered the proposed testimony of Mediator Kelly and determined it would not affect the enforcement of the settlement. Thus, the California Court of Appeals' ruling was sound.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that this Petition for Writ of Certiorari be denied.

Respectfully Submitted,

Kenneth D. Simoncini, Esq.
Counsel of Record
SIMONCINI & ASSOCIATES
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San Jose, CA 95126
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Counsel for Respondent
Norma Tree Service

APPENDIX

APPENDIX

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APPENDIX A

KENNETH D. SIMONCINI, ESQ. (#145586)
KERRI A. JOHNSON, ESQ. (#138344)
MARIE C. BALLON, ESQ. (#227191)
SIMONCINI & ASSOCIATES
Attorneys At Law
1694 The Alameda
San Jose, CA 95126-2219
Telephone: (408) 280-7711
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Attorneys for Defendants, Cross-complainant and Cross-defendant NORMA TREE SERVICE and NORMA GONZALEZ

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

Case No.: 1-06-CV072392

[Filed October 20, 2008]

BILL CHAN,	)
	)
Plaintiff,	)
	)
v.	)
	)
KATHLEEN MARIE LUND and CRAIG T. LUND, individually and as Co-Trustees of LUND FAMILY TRUST	)

and DOES 1 through 20,

Defendants.

KATHLEEN MARIE LUND and CRAIG T. LUND, individually and as Co-Trustees of LUND FAMILY TRUST and DOES 1 through 20,

Cross-Complainant

v.

NORMA TREE SERVICE and ROES 1 through 20, inclusive,

Cross-defendants.

DECLARATION OF KENNETH D. SIMONCINI IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT PURSUANT TO C.C.P. §664.6.

Date: November 13, 2008
Time: 9:00 a.m.
Dept.: 10

I, KENNETH D. SIMONCINI declare:

1. I am the principal in the law firm of Simoncini & Associates, counsel for defendants NORMA TREE SERVICE and NORMA GONZALES in the above entitled matter. If called upon to testify concerning the facts stated, I was present at the subject mediations and specifically the mediation/settlement conference on August 4, 2008, held before Kevin Kelly, acting

through the presiding Judge Neal Cabrinha pursuant to the order of the Court, which trailed the trial scheduled to start on August 4th, to allow further settlement negotiations. I am prepared to state what I observed and occurred at said mediation/settlement conference supporting a motion to enforce the settlement agreement entered on that date pursuant to the terms of CCP664.6.

2. This is a boundary tree cutting claim fueled by longstanding disputes between neighbors on Fallen Leaf Lane, Los Altos, California. Neighbors, plaintiff Bill Chan and defendants, the Lunds, have had issues between them since 1993, when the Lunds so aggressively cut Mr. Chan's photinia hedge on Mr. Chan's side of a grape stake fence between the Chan and Lund Properties that the hedge died. Mr. Chan then planted 14 Leyland Cypress trees, which are fast growing, have a very large spread and have been relatively un-maintained for seven and a half years on that same border. The Lunds contend those Cypress dropped branches and debris on their property; obscured the Lunds ability to see traffic on the street, and were left overgrown into the Lunds property.

3. Defendant Lunds hired Norma Tree to trim the cypress and do other tree trimming on the Lunds property. On May 3, 2005, employee Jose Contrearas, picked up two day laborers to perform the work requested by the Lunds.

4. According to Norma Tree's arborist Torrey Young, the subject overgrown Leyland cypress trees had pre-existing cypress canker before any cutting that occurred on either on May 3rd or 4th, 2005. Nothing Norma Tree did or did not do that day caused

or contributed to that canker condition. Mr. Young will testify that the subject trees have returned to their pre-incident condition and that any "actual damage" to the trees can be corrected by a tree maintenance crew at a cost of $350.00 to $500.00. We entered into settlement discussions with the above facts on the record.

5. The parties stipulated to mediate the claim as the ADR alternative. The stipulated mediator was Kevin Kelly. Mr. Kelly conducted 2 mediations [October 30, 2007 and March 19, 2008]. Pursuant to the Court's orders, Mr. Kelly held a Mandatory Settlement Conference on July 15, 2008, and further mediation/settlement conference on August 4, 2008, while the Court trailed the subject August 4, 2008, trial date.

6. A settlement was entered into on August 4, 2008, signed by plaintiff Bill Chan. Mr. Kelly, wrote the Confirmation of Settlement as a Result of Mediation, a copy of which is attached hereto as Exhibit A. Counsel and Mr. Chan contributed to the language in the agreement. The carriers for the Lunds (State Farm) and Norma Tree (Colony) were present at the August 4, 2008 settlement conference and agreed to pay the sum of $36,100 on behalf of said defendants. The agreement contained the following pointed relevant provisions:

> "The monetary settlement reached in this case is not conditioned or contingent On the parties Lunds or Chang reaching or entering into a stipulated injunctive order."

"The undersigned parties and their legal representatives agree that this settlement Agreement is intended to be a binding settlement agreement and comply with CCP 664.6 and is exempt from confidentiality agreements applicable to the Mediation of the above captioned case."

7. Mr. Kelly explained each and every aspect of the settlement agreement to the parties, including Mr. Chan. I observed and heard nothing which would indicate Mr. Chan had reservations with respect to the monetary settlement as to Norma Tree/Norma Gonzales and the Lunds or was not giving his consent freely. Mr. Kelly explained that the settlement was intended to be a binding settlement agreement and comply with CCP664.6.

8. I received a W-9 signed by Bill Chan, a copy of which is attached hereto as Exhibit B. I ordered the settlement draft in the amount of $25,000, which was received. A copy dated August 7, 2008 is attached hereto as Exhibit C.

9. On August 6, 2008, I received a letter from Sal Sunseri counsel for the Lunds enclosing a Request for Dismissal to be signed by plaintiff's counsel, proposed Release in Full of All Claims and Rights and a Stipulation for Injunctive Orders.

10. On August 12, 2008, I received a letter from David Packard to counsel in which Mr. Packard advised that Mr. Chan had "one reservation and qualification", i.e. about the stipulation for injunctive relief issues only.

11. On August 20, 2008, I received a revised version of the Release of All Claims and Rights from Mr. Sunseri's office. I made a suggestion in writing to Mr. Packard and Mr. Sunseri to reference the lawsuit number in the final form of the Release of All Claims and Rights.

12. I was not involved in the injunctive relief portion of the settlement, and had no information as to how that was proceeding as the settlement on behalf of Norma Tree/Norma Gonzales was strictly monetary.

13. On September 11, 2008, five weeks later, I received a letter from Mr. Sunseri to Mr. Packard indicating that Mr. Chan was either substituting himself or a new attorney. I had been out of the office and not received Mr. Sunseri's calls in that regard.

14. On September 19, 2008, I received a letter from Mr. Packard, which informed that Mr. Chan terminated his representation on August 15, 2008 and that he intended to substitute Mr. Tichinin. A substitution was attached.

15. I have no information that the Substitution was filed; but subsequently received an endorsed filed Substitution filed September 22, 2008.

16. On September 24, 2008, my office received a "Declaration of Bruce Tichinin re: Good Cause Not to Dismiss After Settlement."

17. On its face, the declaration acknowledges that a settlement was entered.

18. The Court trailed the trial one day to allow settlement negotiations to continue. Judge Cabrinha and Mr. Kelly spoke regarding the Court's actions in that regard. The injunctive relief portion of the case had been the impasse at each mediation previously held. On August 4, when there was agreement between Mr. Chan and the Lunds as to how to implement injunctive relief, the monetary issues were settled for $36,100; $25,000 from Norma Tree/Norma Gonzales carrier Colony and $11,000 from State Farm, Lunds carrier.

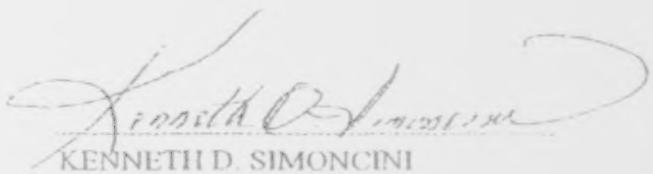
19. I have no information or belief from my attendance observing the proceedings and Mr. Chan at the mediation/settlement conference that Mr. Chan's agreement to settle the case was "not free" as characterized by Mr. Tichinin, who was not present. I am informed that the Court trailed the trial and required the parties and counsel to attend the mediation/settlement conference in the interests of settling the case.

20. Mr. Chan did not contact Mr. Tichinin until two weeks after the settlement according to Mr. Tichinin's declaration. That behavior indicates the settlement was in force until then. Mr. Tichinin's opinion aside on the merits of the case gives rise to a conclusion that "buyer's remorse" as to Mr. Chan was influenced by his contact of Mr. Tichinin, another attorney. That change of mind is insufficient to set aside a binding settlement agreement which was freely entered at the time the terms of the agreement were decided, written, to which Mr. Chan contributed and executed.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is

true and correct to the best of my knowledge. As to those matters stated to be upon information and belief, such statements were made upon a good faith belief as to their truthfulness.

Executed at San Jose, CA, this 20th day of October, 2008.



KENNETH D. SIMONCINI

APPENDIX B

Two pages total

David Packard
706 Cowper Street
Palo Alto, CA 94301
(650) 324-1432 fax

Hi Dave,

Please find attached the W-9 form requested by Mr. Simoncini at yesterday's mediation.

Best regards,

Bill Chan
August 5, 2008

Form W-9 (Rev. October 2007) Department of the Treasury Internal Revenue Service	**Request for Taxpayer Identification Number and Certification**	Give form to the requester. Do not send to the IRS.

Print or type
See Specific Instructions on page 2.

Name (as shown on your income tax return) BILL S. CHAN	
Business name, if different from above	
Check appropriate box: ☒ Individual/Sole proprietor ☐ Corporation ☐ Partnership ☐ Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ➢..... ☐ Other (see instructions) ➢.....	☐ Exempt payee
Address (number, street, and apt. or suite no.) PO BOX 62046	Requester's name and address (optional)
City, state, and ZIP code SUNNYVALE, CA 94088-2046	
List account number(s) here (optional)	

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number
or
Employer identification number

Part II **Certification**

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and

2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and

3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to

sign the certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here	Signature of U.S. person ➢ [signature] Date ➢ 08/03/2008

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),

2. Certify that you are not subject to backup withholding, or

3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also

certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,

- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,

- An estate (other than a foreign estate), or

- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

• The U.S. owner of a disregarded entity and not the entity,

APPENDIX C

[p.30]

TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Court of Appeal Case No. H034196
Superior Court Case No. 1-06-CV-072392

[Dated March 11, 2009]

BILL CHAN,

Appellant/Plaintiff,

vs.

CRAIG T. LUND, et al.,

Respondents/Defendants.

ANd RELATED CROSS-ACTIONS.

Volume V

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REPORTER'S TRANSCRIPT ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT STATE OF CALIFORNIA, COUNTY OF SANTA CLARA BEFORE THE HONORABLE NEAL A. CABRINHA, JUDGE

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FOR THE APPELLANT/PLAINTIFF:

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Appearances continued on next page.

[p.31]

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[p.32]

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
SANTA CLARA COUNTY JUDICIAL DISTRICT
DEPARTMENT NUMBER 10
BEFORE HONORABLE
NEAL A. CABRINHA, JUDGE

Case No: 1-06-CV-072392

BILL CHAN,

Plaintiff,

vs.

CRAIG T. LUND, et al.,

Defendants.

AND RELATED CROSS-ACTIONS

EX PARTE MOTION

TRANSCRIPT OF PROCEEDINGS HELD ON:
WEDNESDAY, MARCH 11, 2009

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MELODY DICKINSON, CSR No. 10299

* * *

[p.44]

because it's not clear to me from your ruling, which made no mention of Mr. Kelly's proffered testimony or the constitutional argument, that you understood me to be making an offer of proof of Mr. Kelly's corroborating testimony.

THE COURT: So the two key facts from plaintiff's standpoint are that he was induced to enter this agreement because his attorney said he'd reduced his

fees by $10,000 and he would not represent him at trial, okay.

MR. TICHININ: Your Honor, I don't think he relied at all on the reduction in fees. It was the threat not to represent him at trial that made the difference.

THE COURT: Okay. That's the -- the gist of plaintiff's claim is that his attorney told him that if you don't take this deal, I'm not going to represent you at trial and you can try it on your own.

MR. TICHININ: Exactly. Right.

THE COURT: Right?

MR. TICHININ: Right.

THE COURT: And the evidence would be that the defendants knew nothing of this when the agreement was signed?

MR. TICHININ: Yes, that's right, Your Honor.

THE COURT: And then the plaintiff said I'm not going to act in accordance with the agreement because I was under duress when I signed it and Kevin Kelly would come to court and testify that, yes, he heard the plaintiff's attorney say if he didn't take this deal, he would not represent him at trial the following day.

Let's assume we have that. testimony from Mr. Kelly

[p.45]

entirely supporting the plaintiff's claim. I don't think in the law the defendants lose their deal. They've got a deal with the plaintiff. This is a case for money. The plaintiff's Complaint is for $78,000 in damage on account of the defendants coming onto his land and cutting 14 Cypress trees. The defendants deny liability but have put together a total of some $37,000 or so which the plaintiff accepted on the apparently fourth day of mediation which took place over a number of months. And that was the subject of the November 13 motion for settlement which I granted. I see no reason since then to rethink this, to reconsider it, whether on plaintiff's motion or the Court's own motion, so I'm going to deny the ex parte application that you present today and I'm going to sign the order that's been submitted by Mr. Sunseri on the November 13th hearing. And if you'd like to file this, Mr. Sunseri.

MR. SUNSERI: I will do that, Judge.

THE COURT: Today is March 11th.

MR. TICHININ: Thank you, Your Honor.

THE COURT: For the record, Mr. Tichinin, I believe you've withdrawn your consent to the form of the order which you had originally given, but you filed a document here that indicates that you've withdrawn your consent or approval of the order.

MR. TCHININ: That's correct.

THE COURT: Okay. Thank you very much.

MS. BALLON: Thank you, Your Honor.

MR. TICHININ: Your Honor, will the ex parte application be filed or should I file it?

* * *

[p.47]

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

I, MELODY DICKINSON, HEREBY CERTIFY: That I was appointed by the Court to act as Official Court Reporter in the above-entitled action; that I reported the same in stenotype and thereafter transcribed the same into typewriting as appears by the foregoing transcript; that said transcript is a full, true and correct statement of the proceedings and evidence to the best of my ability.

I further certify that I have complied with CCP 237 (A) (2) in that all personal juror identifying information has been redacted, if applicable.

Dated this 18th day of March, 2009.

_____
Melody Dickinson, CSR No. 10299
Certified Shorthand Reporter

APPENDIX D

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BILL CHAN

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SANTA CLARA
UNLIMITED JURISDICTION**

No. 106-CV-072392

[Dated October 29, 2008]

BILL CHAN)
)
Plaintiffs,)
)
vs.)
)
CRAIG T. LUND, et al,)
)
Defendants.)
)
AND RELATED CROSS-ACTIONS)
)

DECLARATION OF PLAINTIFF BILL CHAN IN OPPOSITION TO MOTIONS OF DEFENDANTS LUND AND NORMA TREE SERVICE TO ENFORCE SETTLEMENT PURSUANT TO CCP § 664.6

Date: November 13, 2008
Time: 9:00 a.m.
Dept.: 10
Judge: Hon. Neal A. Cabrinha

BILL CHAN declares:

1. I am the Plaintiff in this action.

2. I submit this Declaration in opposition to the dual motions of Defendants LUND and Defendant NORMA TREE SERVICE that seek to enforce the Settlement Agreement that was entered into by me without real and free consent, but with only apparent consent, as described hereafter.

3. I filed this suit for damages for trespass to trees after the Defendants LUND, my neighbors on Fallen Leaf Lane in Los Altos, California, cut trees on my property for the third time.

4. On October 30, 2007, the first mediation in this case was held, at the offices of the mediator, KEVIN KELLY, ESQ. in Redwood City, California.

5. A second mediation was held on November 27, 2007, and a third on March 19, 2008. A

fourth mediation was held on July 15, 2008, in place of a mandatory settlement conference. At these sessions, the parties agreed provisionally to monetary settlement at the monetary amounts that are set forth in the subsequent document, dated August 4, 2008 and entitled "Confirmation Of Settlement As A Result Of Mediation," a true copy of which is attached as **Exhibit 1** (previously and sometimes hereafter "Settlement Agreement"). The provision required to make the monetary amounts effective was that agreement would also be reached as to the terms of a stipulation for an injunction concerning the rights and duties of the parties regarding trees on my property in the future.

6. In May 2008, MR. PACKARD prepared a proposed form of terms for this stipulation for an injunction and forwarded it for review and response by the LUNDS. The counterproposal from the LUNDS was, in my opinion, so severely invasive of my rights that forward motion on agreement between the parties for the stipulation for an injunction stopped.

7. A fourth mediation was held on July 15, 2008, in place of a mandatory settlement conference, because the Defendants LUND were on vacation. No further agreement was reached.

8. Trial of this case was set for August 4, 2008, approximately three weeks after the unsuccessful fourth mediation.

9. On July 25, 2008, just five business days before the scheduled start of trial, at the end of the deposition of an expert witness in the office of KENNETH SIMONCINI, ESQ., the attorney for Defendant NORMA TREE SERVICE, SAL. SUNSERI, the attorney for Defendants LUND, said to my then-attorney of record, DAVID PACKARD, ESQ., words to the effect of: *"There is going to be a delay in the trial for another mediation. I am sure I can get my clients to agree."* MR. PACKARD stated that he agreed. I immediately stated words to the effect of: *Wait a second! I object!"* MR. PACKARD then whispered to me words to the effect of: *"Let's just go along with this."*

10. Because we were in the presence of MR. SUNSERI, I did not want to say anything further until we were out of his presence. Because the deposition had just ended, the next thing that happened was that MR. PACKARD and I left MR. SIMONCINI'S downstairs conference room office and entered its parking lot. I immediately stated words to the effect of: *"If this is mandatory, I'll go. If not, I won't."* MR. PACKARD responded with words to the effect of: *"If you don't go, it will hurt your case."* I responded with words to the effect of: *"MR. KELLY must expect to be paid. I won't pay and I won't attend."* In response, MR. PACKARD

said nothing, but merely laughed and walked away.

11. On Sunday, August 3, 2008, I met with MR. PACKARD to prepare for trial, but the first topic raised was the settlement conference or mediation scheduled for the next day. I again said that I was not going to appear. MR. PACKARD again pressured me to attend, stating that if I did not it would reflect upon his reputation, and that the Judge in the case would give him a hard time at trial.

12. Frustrated, confused and feeling betrayed by MR. PACKARD, I told him that I might call Judge Cabrinha to see how this situation had come about , despite my lack of knowledge or consent.

13. MR. PACKARD said that Judge Cabrinha would not take my call.

14. MR. PACKARD then said that if I did not attend, he would not represent me at the trial, but that I could represent myself. Of course, I viewed this as exceedingly coercive, because I, as a layman, I had no expectation that I could successfully represent myself at trial, and, even if I had the education, training and experience to try the case as an attorney, I had not engaged in any preparation to be the attorney for my case at trial, in reliance on the fact that MR. PACKARD had

* * *

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration is executed on October 29, 2008 at Los Altos, California.

Bill Chan

BILL CHAN

AND
BRIEFS

No. 10-1256

Supreme Court, U.S.
FILED
MAY 27 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BILL CHAN,

Petitioner,

v.

CRAIG T. LUND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT NORMA TREE SERVICE

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INTRODUCTION

California Evidence Code sections 1119 and 1123 led Petitioner to suffer a violation of his due process rights by allowing confidentiality to extend even to the circumstances of his attorney's coercion of him in mediation. As a result, Petitioner lost his property interests in his causes of action without notice or opportunity to be heard before judicial enforcement of the mediation settlement agreement.

Respondent Norma Tree's statements here in opposition have no merit. Petitioner does not seek an advisory opinion, Resp't Opp'n to Pet. at 1, and certainly does not ask the Supreme Court of the United States to determine whether Petitioner was extorted by his attorney. Resp't Opp'n to Pet. at 12. Petitioner presents to this Court a compelling and reviewable issue.

Respondent Norma Tree seeks to distract attention from the due process violation by asserting that no order specifically cited these California Code sections. All parties were well aware that these statutes applied and that their application led to the result brought to this Court's attention. The Respondent Lunds' Brief in Opposition to the Petition, for example, attached the "Acknowledgment Regarding California Evidence Code" in its Appendix at page 3b, which specifically states that "the confidentiality provisions of Sections 1115 through 1128" applied to the mediation. The judges of all lower courts applied these statutes in forming the order and opinion

appealed from here. *See* App. to Pet. at 2, 6, 12-13, 33; Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 14:1-14:2. (Cal. Super. Ct. Mar. 11, 2009) ("I don't think ***in the law*** the defendants lose their deal.") Emphasis added.

ARGUMENT

I. Petitioner Did Suffer Injury In Fact.

Respondent Norma Tree claims Petitioner was not harmed because "Petitioner was never precluded from presenting evidence from the mediation to support his claim." Resp't Opp'n to Pet. p. 8.

Later, Respondent Norma Tree contradicts itself, stating that "[t]he only authentication" of Petitioner's conversation with the attorney who coerced him was Petitioner's declaration, a declaration "riddled with hearsay." Resp't Opp'n to Pet. p. 9. Naturally, due to the mediation confidentiality law, Cal. Evid. Code §§ 1119; 1123, Petitioner's declaration was the only admissible evidence of Petitioner's conversation with his attorney. Under California's mediation confidentiality law, any authentication of Petitioner's word was impossible. This is precisely the due process violation caused by the California statutes as applied. Indeed, it would render mediation entirely untrustworthy and unappealing if any party could later rescind a mediation settlement agreement based on his declaration alone. Respondent Norma Tree only makes clear the impossible position of Petitioner. This position is an as-applied due process violation, legitimately and importantly posed for this Court's review.

Furthermore, counsel for the Lunds and counsel for Respondent Norma Tree stated in the record that Petitioner was able to present only allegations and speculation. Counsel for the Lunds first stated:

> **Mr. Sunseri**: What we still have is Mr. Chan's allegation, *and that's all it is*, Mr. Chan's *allegation* with regard to some duress *supposedly* imposed on him by Mr. Packard.
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 8:17-19 (Cal. Super. Ct. Mar. 11, 2009). Emphasis added.

Counsel for Respondent Norma Tree stated:

> **Ms. Ballon**: I want to echo Mr. Sunseri's statements, Your Honor, that there's no corroborating evidence that this in fact was procured under duress. It's simply to date is *still an allegation*. There's been no evidence of the fact it took place that way. To say that Mr. Kelly will testify this way or that is *speculation*. It's *also questionable whether such testimony would even be admissible under the mediation privilege*. . . .
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 9:20-27 (Cal. Super. Ct. Mar. 11, 2009). Emphasis added.

Under the California Evidence Code sections 1119 and 1123, it would have been impossible for Petitioner to seek and introduce evidence to corroborate his declaration, unless all parties waived mediation confidentiality. Counsel for Petitioner stated that Petitioner would waive if the others would waive:

> **Mr. Tichinin**: I will certainly, and Mr. Chan will certainly, waive that privilege to allow Mr. Kelly to testify if both other parties will waive it as well.
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 11:2-4 (Cal. Super. Ct. Mar. 11, 2009).

All other parties did not waive. Judge Cabrinha denied the second ex parte application.

Clearly, Petitioner did not have "every opportunity" as Respondent Norma Tree falsely concludes, Resp't Opp'n to Pet. at 9, although he took every opportunity he could take under the California law at issue here.

Respondent Norma Tree also erroneously concludes that the court did consider the proposed testimony, thereby resulting in no injury in fact. *See* Resp't Opp'n to Pet. at 4. When Judge Cabrinha denied Petitioner's second ex parte application he could not have been assuming, as Respondent suggests, the receipt of *admissible* evidence *proving* that Petitioner's attorney coerced Petitioner to attend mediation involuntarily and to sign the settlement agreement involuntarily. Judge Cabrinha would then have been judicially enforcing an agreement *proven* to have been coerced and extorted. Judge Cabrinha must have been assuming the existence of the evidence, but nevertheless, applying the California Evidence Code sections 1119 and 1123, realized that the evidence would be inadmissible. In fact, he said, "I don't think ***in the law*** the defendants lose their deal." Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 14:1-14:2. (Cal. Super.

Ct. Mar. 11, 2009). Emphasis added. This likewise contradicts Respondent Norma Tree's assertion that the trial court never applied the mediation confidentiality statutes. Resp't Opp'n to Pet. at 8. Without expressly citing them, Judge Cabrinha did clearly apply them.

Petitioner did suffer a true injury in fact. Procedural due process injuries occur at the moment that notice and a meaningful opportunity to be heard are lost regarding the taking of property interests by state action. The injury to Petitioner took place on the application of California Evidence Code sections 1119 and 1123 to his circumstances of involuntary participation and signature to a mediation settlement agreement.

The analogy to *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) (*Mullane*) on this procedural due process violation is sound. Respondent reads *Mullane* extremely narrowly, identifying the issue solely as one of the constitutional validity of notice by newspaper publication. Petitioner's case should be considered under the reasoning of *Mullane* because the question here, as in *Mullane*, is whether specific state statutes have allowed the procedural due process rights of a person with a protectable property interest to be cut off.

Also notable are the protectable property interests in each case. In *Mullane*, the trust beneficiaries had property rights not only in their financial assets, but in potential negligence causes of action against the

fiduciaries. The rights to notice and opportunity to pursue these claims were cut off by the statutory scheme allowing for notice by newspaper publication only. Here, Petitioner also had property interests in his causes of action. His property interests were also cut off by state statutes. As this Court summarized,

> [In] the *Mullane* case itself, . . . the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. There, the Court confronted a challenge to a state law that provided for the settlement of common trust fund accounts by fiduciaries, upon notice given through newspaper publication. The effect of the statute was to terminate 'every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund.' Id., at 311, 70 S.Ct., at 655. This, the Court concluded, worked to deprive the beneficiaries of property by, among other things, 'cut[ting] off their rights to have the trustee answer for negligent or illegal impairments of their interests.' Id., at 313, 70 S.Ct., at 656. Such a result was impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect. Id., at 315, 70 S.Ct., at 657.
>
> * * *
>
> This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who

> seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.
>
> Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-429 (1982).

In direct conflict with this Court's holding in *Logan*, *supra*, 455 U.S. at 428-429, the California Supreme Court has just ***categorically*** held that "mere loss of evidence pertinent to the prosecution of a lawsuit for civil damages does not implicate such a fundamental interest" as does the loss of evidence in criminal defense. Cassel v. Wasserman, 51 Cal.4th 113, 135 (2011). Despite the potentially complete cutting off of one's pursuit of protectable property interests, as has occurred here, the California Supreme Court found no "due process concerns so fundamental" to make an exception to mediation confidentiality. *Id*.

In fact, Petitioner's property interests were affected more dramatically than in *Mullane*. In *Mullane*, the trust beneficiaries with known addresses did at least have some chance, however remote, to notice the newspaper publication and take action. Petitioner has had absolutely no opportunity to be heard on the highly improper loss of his causes of action.

In *Mullane*, the constitutionally defective statute allowed for the trustee of the property interests to put those property interests in jeopardy unbeknownst to the trust beneficiaries. Similarly here, the California statutes at issue allow for an attorney to put his

client's property interests in jeopardy, unbeknownst to the client because the client does not realize that attorney misconduct, including duress and extortion, will be rendered absolutely privileged. Respondents may argue that Petitioner signed an acknowledgment of the application of the California Evidence Code, but any reasonable party would not predict the horrible sequence of events as has occurred here, and would not consider the acknowledgment to be a waiver of any constitutional rights. Any reasonable party would expect confidentiality to bar him or her from using anything said in the future pursuit of their claim should mediation fail. He or she would not reasonably expect mediation confidentiality to force relinquishment of causes of action.

Petitioner lost his causes of action through judicial enforcement of a mediation settlement agreement. His opportunity to be heard on the loss of those property interests was cut off by the California Evidence Code sections 1119 and 1123. Judge Cabrinha knew that Petitioner's rights to seek evidence (and thereby possibly restore Petitioner's involuntarily relinquished causes of action) were cut off by these statutes. Applying the same, Judge Cabrinha denied Petitioner's second ex parte application. Thus, Petitioner's case is both compelling and proper for this Court's review.

II. Respondent Falsely Accuses Petitioner of Misrepresenting The Record.

Respondents themselves acknowledged, via counsel, that Petitioner was only permitted to present an

allegation and speculation thereon. *See* section I, *supra*. Respondent Norma Tree acknowledged this in their opposition as well. *See* section I, *supra*.

III. It Is Well-Known That California's Mediation Confidentiality Law Is Strict, And That Its Strict Nature Poses Broad-Spanning Problematic Consequences, Here A Due Process Violation.

First, Respondent Norma Tree again makes the flatly false statement that "Petitioner was not precluded from presenting evidence from the mediation on account of California's 'strict' mediation confidentiality statutes." Resp't Opp'n to Pet. at 12. It is obvious that this is exactly what happened. *See* section IV, *infra*; *see* also section I, *supra*, in which counsel for Respondents repeatedly admitted that Petitioner could present only his allegation and speculation via his declaration; *see* also Cal. Evid. Code §§ 1119, 1123; *see* also Cal. Evid. Code § 1127, which would have subjected Petitioner to attorney's fees and costs had he attempted to subpoena the mediator, Mr. Kelly; *see* also Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 14:1-14:2. (Cal. Super. Ct. Mar. 11, 2009) in which Judge Cabrinha concluded on granting defendants' motion to enforce the settlement agreement: "I don't think ***in the law*** the defendants lose their deal."

Second, Respondent Norma Tree is mistaken regarding the impact of this case. The California courts

alone have been repeatedly faced with a string of problems resulting from California's strict mediation confidentiality law, including due process concerns. *See* Cassel v. Wasserman, 51 Cal.4th 113 (2011); Porter v. Wyner, 250 P.3d 180 (2011), *vacated and transferred to Ct. of Appeal in light of* Cassel v. Wasserman, *supra*; Simmons v. Ghaderi, 44 Cal.4th 570 (2008); Wimsatt v. Superior Court, 152 Cal.App.4th 137 (2007); Fair v. Bakhtiari, 40 Cal.4th 189 (2006); Rojas v. Superior Court, 33 Cal.4th 407 (2004); Foxgate Homeowners' Ass'n v. Bramalea California Inc., 26 Cal.4th 1 (2001); Rinaker v. Superior Court, 62 Cal.App.4th 155 (1998).

The 2007 California Court of Appeal decision in *Wimsatt v. Superior Court*, *supra*, 152 Cal.App.4th 137 which reluctantly legalized malpractice in mediation due to the strictness of the same statutes at issue here stated that there should be specific warnings before parties enter mediation:

> In light of the harsh and inequitable results of the mediation confidentiality statutes (Evid. Code, § 1115 et seq.), such as those set out above, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute.
>
> Wimsatt v. Superior Court, 152 Cal.App.4th at 164.

This same decision illustrated the impact of California's mediation confidentiality statutes:

The inequities of California's mediation statutes have not gone unnoticed. Peter Robinson, the associate director of the Straus Institute for Dispute Resolution and assistant professor of law at Pepperdine University School of Law, has gathered a number of cases across the country in which courts have been asked to enforce or avoid mediated agreements. He suggests strict confidentiality (such as codified in Evidence Code section 1115 et seq.) results in absurd enforcement, when contrasted with another approach to the enforcement of mediated settlements. The nonexhaustive list of cases includes situations raising arguments about whether a mediated agreement was reached, whether there was fraud, duress or mistake, and whether the agreement violated public policy. The *situations include cases where a party was lied to by her own attorney*, the mediator, and a third party; a scrivener's error in a mediated settlement lead to a $600,000 windfall to one party; *parties claimed their own attorney coerced them into signing a settlement agreement*; a mother waived parental rights; and the parties agreed to perform an illegal act in the mediated agreement. (Robinson, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, 2003 J.Disp. Resol. 135.)

As Professor Robinson notes, *a strict approach to mediation confidentiality often prevents courts from "exploring and justly deciding*

> *controversies that might arise out of mediated agreements."* (Robinson, Centuries of Contract Common Law Can't Be All Wrong: Why the UMA's Exception to Mediation Confidentiality in Enforcement Proceedings Should be Embraced and Broadened, supra, 2003 J.Disp. Resol. at p. 138, fn. omitted.) The California cases we discussed above are illustrative. *They have allowed to go unpunished sanctionable conduct that frustrated the purpose of mediation* (Foxgate, supra, 26 Cal.4th 1, 108 Cal.Rptr.2d 642, 25 P.3d 1117), *foreclosed litigants from gathering evidence that might prove toxic molds and other microbes created health hazards* (Rojas, supra, 33 Cal.4th 407, 15 Cal.Rptr.3d 643, 93 P.3d 260), *precluded a propria persona litigant from proving the terms of a mediated agreement* (Eisendrath, supra, 109 Cal.App.4th 351, 134 Cal.Rptr.2d 716), *and shielded from view evidence of criminal conduct* (Doe 1, supra, 132 Cal.App.4th 1160, 34 Cal.Rptr.3d 248).
>
> Wimsatt v. Superior Court, *supra*, 152 Cal.App.4th at 163-164, emphasis added.

Most fundamentally here perhaps is the fact that this new form of settlement agreement, an agreement which is statutorily authorized, court-ordered, and court-sponsored, has been enforced by a court of law. It demands, on that basis alone, that a due process analysis be performed. *See* Shelley v. Kraemer, 348 U.S. 1 (1948).

IV. The Court of Appeal's Decision Was Unsound Given The Trial Court's Actual Application of California's Mediation Confidentiality Law.

First, Respondent Norma Tree itself apparently disagrees with the Court of Appeal on at least one point. Respondent Norma Tree states that an offer of proof was made, Resp't Opp'n to Pet. at 4, while the Court of Appeal called Petitioner's offer of proof a mere "offer of hope." Pet. App. at 35, n. 27.

Second, the Court of Appeal wrongly avoided Petitioner's due process claim by finding that no specific order excluded the evidence Petitioner sought to introduce. Pet. App. at 35. This was far from an academic or theoretical issue. Inherent in the order granting defendants' motion to enforce, Pet. App. at 39-42, was the exclusion of the evidence on Petitioner's offer of proof, an offer of proof which Respondent Norma Tree agrees was made. Resp't Opp'n at 4.

The key words Judge Cabrinha spoke on granting defendants' motion to enforce were:

> **The Court**: Let's assume we have that testimony from Mr. Kelly entirely supporting the plaintiff's claim. I don't think ***in the law*** the defendants lose their deal."
>
> Chan v. Lund, No. 106-CV-072392, Hr'g Tr. at 13:28-14:2. (Cal. Super. Ct. Mar. 11, 2009.) Emphasis added.

That law referenced was California Evidence Code sections 1119 and 1123. Judge Cabrinha applied it in

his decision to enforce the settlement agreement. The Court of Appeal upheld that application. No specific order was necessary, nor should be necessary, lest this case become one capable of repetition, but evading review.

CONCLUSION

State law permitting judicial enforcement of a coerced settlement agreement is indeed a compelling issue. Broadly, this case asks whether certain abuse in civil dispute resolution will be sanctioned by the law. Specifically, this case asks whether it is constitutional to deny to an involuntary participant and involuntary signatory to a mediation settlement agreement any meaningful opportunity to prove the involuntary means by which that settlement agreement was reached before it is enforced by a court of law. Application of California's mediation confidentiality law has cut off Petitioner's meaningful opportunity to do so, thereby depriving him of his property interests without due process of law.

Respectfully submitted,

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